PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R v V*, 2020 NSPC 31

Date: 2020-08-13
Docket: 8450054, 8450055, 8450056, 8450057
Registry: Pictou

Between:

Her Majesty the Queen

v

ASV

DECISION REGARDING TERMS OF REMAND

Restriction on Publication: By court order made under subsection 486.4(1) of the *Criminal Code*, information that may identify the person described in this decision as the complainant may not be published, broadcast or transmitted in any manner. This decision complies with this restriction so that it can be published.

Judge:	The Honourable Judge Del W Atwood
Heard:	2020: 12 June in Pictou, Nova Scotia
Written decision Released:	2020: 13 August
Charge:	Sections 271, 286.1 and 733.1 of the *Criminal Code of Canada*
Counsel:	Peter Dostal for the Nova Scotia Public Prosecution Service Douglas Lloy QC for ASV

Section 486.4(1) states:

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

By the Court:

[1] The following is an expansion of reasons which I gave from the bench on 12 June 2020 dealing with terms of remand. The issue which the court encountered at that time is a recurring one; I am hopeful that the publishing of a written decision might assist in the prospective resolution of these sorts of problems.

[2] ASV was arrested by police on 11 June 2020 on charges under § 271, 286.1 and 733.1 of the *Criminal Code of Canada*; some 22 hours later, as the time limit for bringing Mr V before a judicial officer—a limit prescribed by ¶ 503(1)(a) of the *Criminal Code*—was counting down to the zero hour, he was arraigned, while still in custody, before a presiding justice of the peace and remanded to this court to appear by videolink; the videolink procedure is in accordance with the published directive, *COVID-19: Measures Applicable to the Provincial Court of Nova Scotia—Monday, March 16, 2020*, accessed online at: https://courts.ns.ca/News_of_Courts/documents/NSPC_Measures_03_16_20.pdf.

[3] In addition to the statutory obligation to bring a person who has been arrested before a justice without unreasonable delay, there was a further necessary step police ought to have taken that was omitted in this case.

[4] Mr V is a Columbian national. This brings into play a component of conventional international law.

[5] The governing instrument is the *Vienna Convention on Consular Relations*, 596 UNTS 261, Can TS 1974 No 25 (Entered into force 19 March 1967, accession by Canada 18 July 1974 with effect from 17 August 1974, 943 UNTS 424) [*VCCR*]. The Republic of Columbia became a state party to the *VCCR* by ratification on 6 September 1972, with effect on 6 October 1972, 834 UNTS 376.

[6] Article 36 of the *VCCR* places an obligation upon an authority of a state party that arrests or detains a citizen of another state party:

- to inform the detained person of the right to consular access;
- to ensure that the detained person receive consular access.

[7] The *Foreign Missions and International Organizations Act*, SC 1991, c 41, § 3(1) (*FMIOA*) declares specifically that certain articles of the *VCCR* have the force of law in Canada; art 36 is not one of them.

[8] However, art 5, ¶¶ (a), (e) and (i) of the *VCCR*—provisions which are legalised by the *FMIOA*—affirm that consular functions include providing assistance to and safeguarding the interests of nationals of states parties.

[9] Further, Canada has never deposited a reservation to art 36.

[10] Finally, a notification requirement as comprehended in art 36—unlike the immunity and consular-inviolability protections of the *VCCR* legalised in the *FMIOA*—would not seem to need enabling legislation, any more than, say, the customary police caution that has been an integral part of Canadian criminal law for generations without having needed a statute to engage it.

[11] All of this leads me to conclude that art 36 of the *VCCR* is enforceable in Canada and is in conformity with existing Canadian law.

[12] In this case, the prosecution has acknowledged very candidly that the inform-and-implement requirements of art 36 of the *VCCR* were not carried out by the policing service that arrested and detained Mr V.

[13] The process of effecting a lawful arrest places a substantial workload burden on police, as there are an array of legal and constitutional mandates that must be fulfilled. Complicating the arrest of Mr V was the need to obtain Spanish-

language interpreter services, which, as I understand it, police were able to arrange successfully.

[14] When workloads are heavy, steps can get missed. This is why checklists are essential. A *VCCR*-compliance item would seem to be one that could be added to an arrest-operations-policy checklist quite easily.

[15] It is significant to note that this is the third time in recent memory that it has come to the attention of the court that the policing service involved in this arrest action has not complied with the requirements of art 36 of the *VCCR*. I addressed an earlier occurrence on the record, although I did not issue written reasons in that case.

[16] Various Canadian, foreign and international tribunals have found that non-compliance with art 36 of the *VCCR* may have detrimental effects upon the liberty, fair-trial and protection-from-self-incrimination interests of persons who have been detained outside their home states.

[17] An optional protocol to the *VCCR* includes a dispute-resolution mechanism (596 UNTS 487), which provides for the sorting out of non-compliance as a matter to be resolved between states.

[18] Canada is not a signatory to this instrument.

[19] Nevertheless, it has been argued that breaches of art 36 may be addressed through domestic law, so as to provide remedies to individual foreign nationals; there has been some treatment of this in Canada: see *R v Van Bergen*, 2000 ABCA 216 at ¶ 16, leave to appeal to SCC refused, [2000] SCCA No 403; *R v Partak*, [2001] OJ No 6279 at ¶ 37 (SCJ); *R v Provo* 2015 ONCJ 311 at ¶ 63; and see *R v Smalley*, 2017 NSSC 291 at ¶ 121-122; *R v Souvannarath*, 2017 NSSC 107 at ¶ 7; and *R v Farahanchi*, 2010 NSPC 57 at ¶ 32.

[20] Mr V is represented by counsel, and we have a properly qualified and affirmed interpreter assisting in the translation of today's proceedings.

[21] Mr V is consenting to being remanded until later this month.

[22] This is a statutory court, and the court may act only as authorized by law.

[23] I am satisfied that art 36 of the *VCCA* is such a law, which compels the court to act, much as the court must do when bound by any law.

[24] Accordingly, as this court is detaining Mr V, I order and direct that the Form 19 remand warrant in this case be endorsed to require that corrections authorities place Mr V in contact with the diplomatic mission of the Republic of Columbia to Canada; this is to be done without delay. In my view, this order is

not in any way inconsistent with the authority of the court under § 516 of the *Code* to order a remand pending a release hearing.

[25] I wish to make clear that, in taking this step, the court is not acting as a proxy for the executive branch of government. Policing authorities operate as an arm of the executive; the court does not. The court is not an adjunct of the executive, and is not a property of the executive. It is independent of the executive. Judicial independence means more than elements of tenure, resourcing and administration. It means that the court should act independently of the executive, particularly when the executive has not carried out an important legal responsibility owed to persons who find themselves under the restraining authority of the state.

[26] The court is grateful to Mr Dostal for the diligence and candor with which he responded to the inquiries of the court.

JPC