PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R v SW*, 2020 NSPC 34

Date: 20200902
Docket: 8459518
Registry: Kentville

Between:

R

v.

SW

Amendment to Officer in Charge Undertaking

Judge:	The Honourable Judge Ronda van der Hoek, JPC
Heard:	September 2, 2020, in Kentville, Nova Scotia
Decision:	September 2, 2020
Charge:	s. 430 *Criminal Code of Canada*
Counsel:	James Fyfe, for the Crown Kenneth Greer, Q.C., for the Applicant

By the Court:

[1] This is an application to amend an undertaking given to a police officer pursuant to section 503(2) of the *Criminal Code of Canada*.

[2] Section 503(2.1) of the *Code* provides authority to a peace officer, if satisfied that a person should be released from custody conditionally, to release him on an Undertaking in Form 11.1 with conditions contained therein.

[3] In this case the officer in Charge Undertaking includes a condition g that Mr. SW surrender his passport to a named member of the RCM Police. That condition is included pursuant to section 503(2.1)(d) of the *Code*. Another condition today added to this application is condition b -remain in Kings County.

[4] Section 503(2.2) allows a person to apply to the Provincial Court, prior to the date set out in a Promise to Appear to attend court to answer the charge, to come before the court seeking amendment or deletion of conditions.

[5] Mr. SW was required by the undertaking to attend court on September 1, 2020 to answer to a charge of mischief contrary to s. 430 of the *Code*.

[6] I understand counsel for Mr. SW has made diligent effort to seek Crown support for a change to the undertaking allowing a return of his client's passport. The matter has been docketed for today.

[7] Where conditions set in place by police are onerous, or present difficulty in being upheld by the accused, he may apply to the court to hold a hearing on the reasonableness of the subject condition. These matters often proceed prior to a charge being laid against an accused person with an application commenced by filing a written application with supporting documents. After reading the material, a reviewing judge could issue an order for a hearing and direct the Crown be served with a date. The Court does not have jurisdiction under s. 520 of the *Code* to entertain an application from an accused to amend an undertaking, but a judge does have jurisdiction under s. 503 of the *Code* to amend an undertaking given to a peace officer or officer in charge prior to or at any appearance he makes pursuant to the undertaking. Such applications are not limited to the first appearance. See: *Re Petrovic and the Queen* (2006), 205 C.C.C. (3d) 575 (OSCJ).

[8] At the outset I am told this is now a consent to amend the undertaking to remove conditions b and g allowing Mr. SW to leave the country and obtain in passport.

[9] Defence counsel advised when setting this matter down that Mr. SW is not a Canadian citizen. He is in this country to attend University. Over the past few months of the pandemic he has been trapped in Canada and has suffered the loss of his grandparent and missed the funeral when he could not leave the country.

[10] I am told his continued stay in Canada represents a financial hardship to him.

[11] I am also told he has no desire to avoid the criminal process in this country, but simply seeks return of his passport to aid a return to his country.

[12] Defence counsel was most concerned about the condition, noting his client is a black man, and counsel has not seen such a condition imposed on non-citizen white persons. In highlighting the relatively minor nature of the charge his client faces, he compared it to a white non-citizen client charged with a drug trafficking offence who was not burdened by the condition to surrender his passport.

[13] The Court had anticipated being asked to question the condition as it seems unusual and excessive, as the court should be alive to patterns that may suggest this condition was being routinely imposed on black persons. (See *R. v. Zora*, 2020 SCC 14 at para. 103)

> [103] Judicial officials have adequate tools to ensure that bail orders are generally appropriate while conserving judicial resources. They can and should question conditions that seem unusual or excessive. They should also be alert for any pattern that might suggest that conditions are being imposed routinely or unduly.

[14] I am reminded of a recent decision by Judge Atwood, *R. v. V.*, 2020 NSPC 31, wherein he commented on the situation of foreign nationals who were not regularly provided consular assistance when charged in his jurisdiction. While not on all points with this matter before me, it does serve to remind a court that foreign nationals are in a unique position and their circumstances are most often very different from that of Canadian people. It is important that courts as well as the police remain aware of same. Recently the SCC reminded courts to ascertain citizenship in the regular course, as criminal proceedings have consequences for non-citizens that may be different and more serious than those of our own citizens- for example deportation.

[15] Judge Atwood was aware of the peculiar circumstances in his jurisdiction, I am not aware of systemic issues involving the routine imposition of passport forfeiture provisions on black people in this jurisdiction. That said, I do have authority to review such a condition.

[16] The passport condition must surely be aimed at a ground of detention in s. 515(10) -securing attendance of the accused before the court, a condition that can

be necessary in some situations, but not in the circumstances of Mr. S.W. as I understand them.

[17] Mr. SW is not employable in this country and I am told he has suffered financially as a result of his forced stay. He is a person who can be presumed to be without a criminal record as he was clearly admissible to Canada on the student visa program, strongly suggesting no past criminality in his home country. He benefits from the presumption of innocence on the matter before the court.

[18] I am satisfied that the subject conditions are not necessary to secure Mr. SW's attendance before the court to attend to the matter. During the pandemic many accused persons are appearing virtually by phone or video for election and plea, as well as for virtual trials by video or even phone. There is no impediment to Mr. SW employing those options as well.

[19] I am amending the officer in charge undertaking, cognizant of the fitting observations of the Supreme Court of Canada in ***R v Zora***, *supra,* conditions should be minimal and directly related to the circumstances of the accused, the allegations and the three grounds considered on bail. At paragraph 6 the court said:

> [6] All those involved in the bail system are to be guided by the principles of restraint and review when imposing or enforcing bail conditions. The principle of restraint requires any conditions of bail to be clearly articulated, minimal in number, necessary, reasonable, least onerous in the circumstances, and

> sufficiently linked to the accused's risks regarding the statutory grounds for detention in s. 515(10). The principle of review requires everyone, and especially judicial officials, to carefully scrutinize bail conditions at the release stage whether the bail is contested or is on consent. Most bail conditions restrict the liberty of a person who is presumed innocent. Breach can lead to serious legal consequences for the accused and the large number of breach charges has important implications for the already over-burdened justice system. Before transforming bail conditions into personal sources of potential criminal liability, judicial officials should be alive to possible problems with the conditions.

[20] Continuing at paragraph 83, the court said:

> [83] All those involved in setting bail terms must turn their minds to the general principles for setting bail, which restrain how bail conditions are set. As the default position in the *Code* is bail without conditions, the first issue is whether a need for any condition has been demonstrated. Restraint and the ladder principle require anyone proposing to add bail conditions to consider if any of the risks in s. 515(10) are at issue and understand which specific risks might arise if the accused is released without conditions: is this person a flight risk, will their release pose a risk to public protection and safety, or is their release likely to result in a public loss of confidence in the administration of justice?

[21] The court also set out a helpful checklist for consideration:

- If released without conditions, would the accused pose any specific statutory risks that justify imposing any bail conditions?
- Is this condition necessary?
- Is this condition reasonable?
- Is this condition sufficiently linked to the grounds of detention under s. 515(10)(c)?

- What is the cumulative effect of all the conditions?

[22] In the circumstances of this application the Crown, the defence and indeed the Court all have an obligation to respect the principles of restraint and review and consider conditions of release.

[23] Admirably, the Crown obviated the need for a hearing in this matter and appropriately reviewed the conditions that are the subject of this application, making a wise and considered decision to accept the submissions of defence counsel and reduce the conditions that had been imposed on Mr. SW. I thank the Crown for his careful consideration of the issues and Mr. Greer for raising them and not keeping Mr. SW in a situation of being overly burdened by conditions that are contrary to the SCC direction in *Zora*, *supra*. Unfortunately, Mr. SW cannot be put back to a point in time where he could have attended his grandfathers' funeral, but he can now return to his home country.

van der Hoek, J