**SUPREME COURT OF NOVA SCOTIA**
**Citation:** *R. v. Murphy*, 2018 NSSC 56

**Date:** 20180312
**Docket:** CRH No. 473249
**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

Lonnie Marcell Murphy

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**APPLICATION TO VARY RECOGNIZANCE**
**D E C I S I O N**

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| **Judge:** | The Honourable Justice Glen G. McDougall |
| **Heard:** | March 6, 2018 |
| **Oral Decision:** | March 12, 2018 |
| **Written Decision:** | April 3, 2018 |
| **Counsel:** | Susan Bour, on behalf of the Federal Crown<br>Mark Heerema, on behalf of the Provincial Crown<br>Mark Knox, Q.C., on behalf of the Applicant, Mr. Murphy |

**By the Court:**

[1] The accused, Lonnie Marcelle Murphy, faces a number of very serious offences which include two counts of possession for the purpose of trafficking, one involving cocaine and the other cannabis (marijuana), contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, 1996 SC, Chap. 19 (hereinafter "*CDSA*").

[2] He is also charged with a considerable number of other offences alleging possession of property obtained by crime, contrary to s. 355(a) and (b) of the *Criminal Code of Canada*, RSC 1995, c. C-46 (hereinafter "*Criminal Code*"), as well as trafficking in property obtained by crime, contrary to s. 355.5(a) of the *Criminal Code*.

[3] Mr. Murphy is also charged with four firearms related offences under the *Criminal Code*.

[4] Given the nature of the charges of possession for the purpose of trafficking in cocaine and cannabis (marijuana) under s. 5(2) of the *CDSA*, the onus to show cause why the accused's detention in custody was not justified fell on the accused as per s. 515(6) of the *Criminal Code*.

[5] Discussions between Crown counsel and Defence counsel resulted in a consent release plan which found acceptance with the presiding Provincial Court judge, the Honourable Judge Michael Sherar. A recognizance with two sureties, each pledging $3,000.00, was issued on October 31, 2017.

[6] A Notice of Hearing seeking a review of the "house arrest" condition of the recognizance was filed with the Supreme Court on February 14, 2018. Due to the fact that the plan of release had resulted from an agreement between Crown counsel and counsel for the accused, there was no transcript presented for my review.

[7] I do not necessarily agree with this approach in all cases where a consent release plan has been presented to the bail judge for his or her consideration.

[8] In *R. v. Antic*, [2017] SCJ No. 27, 2017 SCC 27, at para. 68, Wagner, J. (now the Chief Justice of the Supreme Court of Canada) stated:

> 68 Of course, it often happens that the Crown and the accused negotiate a plan of release and present it on consent. Consent release is an efficient method of

> achieving the release of an accused, and the principles and guidelines outlined above do not apply strictly to consent release plans. Although a justice or a judge should not routinely second-guess joint proposals by counsel, he or she does have the discretion to reject one. Joint proposals must be premised on the statutory criteria for detention and the legal framework for release.

[9] I believe it is incumbent upon the bail judge to inquire into the reasons for the release plan being presented to satisfy the statutory requirement that release be on the lease onerous conditions. As such, a transcript of the hearing under review should, generally speaking, be made available especially if the bail judge has inquired into the circumstances supporting the consent release plan. And, in the circumstances of the present case where the accused has been ordered to comply with:

> (g) HOUSE ARREST: TO REMAIN IN YOUR RESIDENCE AT ALL TIMES (EXCEPT AS INDICATED BELOW):
>
> - WHEN DEALING WITH A MEDICAL EMERGENCY OR MEDICAL APPOINTMENT INVOLVING YOU OR A MEMBER OF YOUR HOUSEHOLD AFTER ADVISING HALIFAX REGIONAL POLICE AT 902-490-3600;
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> - WHEN ATTENDING A SCHEDULED APPOINTMENT WITH YOUR LAWYER, YOUR SUPERVISOR OR A PROBATION OFFICER, AND TRAVELLING TO AND FROM THE APPOINTMNET BY A DIRECT ROUTE;
>
> - WHEN ATTENDING COURT AT A SCHEDULED APPEARANCE OR UNDER SUBPOENA, AND TRAVELLING TO AND FROM COURT BY A DIRECT ROUTE;
>
> - BETWEEN THE HOURS OF 4PM AND 8PM ON THURSDAYS EACH WEEK FOR THE PURPOSE OF ATTENDIGN TO PERSONAL NEEDS.

[10] In order to prove compliance, Mr. Murphy is required to present himself at the entrance to his residence at any time a peace officer or his supervisor attends there for that purpose.

[11] Halifax Regional Police Sergeant Gordon Graham testified that he has personally carried out compliance checks on the accused. He also testified that other members of his unit have been assigned to do similar checks. These checks could be carried out as often as twice a week. Sgt. Graham was not aware of any alleged breaches pertaining to Mr. Murphy.

[12] Sgt. Graham testified that after completing a recent compliance check, Mr. Murphy stuck his head out a window and hollered that he knew who the informant is and then added: "You'll get a big surprise in court". This was perhaps not one of Mr. Murphy's better moments. I will attribute the comment to a combination of bravado and bad judgment; but, it is not something dissuades me from considering the merits of the bail review application.

[13] I will now look at the provisions of the *Criminal Code* relating to bail review.

[14] A bail review hearing is considered a "hybrid" process in that it is not a true appeal nor is it a hearing *de novo*. The accused and prosecutor can adduce new evidence to show a material change in circumstances or to point out an error of law or principle. Bail review is available to an applicant: (1) where there is admissible new evidence; (2) where the impugned decision contains an error of law; or, (3) where the decision is clearly inappropriate.

[15] The onus in a bail review hearing is always on the party applying for review to show cause to vary or vacate the initial bail order. The recent cases do not explicitly state the burden of proof but some older decisions indicate that the burden of proof on the applicant is on a balance of probabilities. Cases from other provinces confirm this.

[16] The reviewing judge may consider the following types of evidence: the transcript of the bail hearing and of any previous review(s) of the bail order; any exhibits filed in the bail hearing; and, other such evidences tendered by the prosecutor or the accused. The reviewing judge has the power to either dismiss the application or, if the applicant shows cause, may vacate or vary the original bail order.

[17] A judge can review a bail order where there is new evidence and/or a material change in circumstances. Sections 520(7) and 521(8) provide that the reviewing judge may consider the transcript(s) of any previous bail proceedings, any exhibits filed in previous proceedings and additional evidence or exhibits tendered by the accused or the prosecutor. The Supreme Court of Canada in *St-Cloud*, 2015 SCC 27, cited the test from *R v Palmer*, [1980] 1 SCR 759 as to what constitutes "new evidence" on appeal and endorsed this test as relevant to determining "new evidence" for the purposes of bail review under ss. 520 and 521. The *Palmer* test provides that the following criteria must be met for evidence to be considered "new evidence":

1. the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial;
2. the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
3. the evidence must be credible in the sense that it is reasonably capable of belief; and
4. it must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[18] The Supreme Court of Canada in *St-Cloud* further elaborated that due to the "generally expeditious nature" of the bail process and the "risk of violating the rights of the accused", the reviewing judge must apply the *Palmer* criteria flexibly. The Supreme Court of Canada indicated that this is in accordance with *Criminal Code* s. 518, which provides that "the rules of evidence are relaxed in the context of the release hearing".

[19] The Supreme Court of Canada summed up the principle of evidence in a bail review hearing as follows: "a reviewing judge may consider evidence that is truly new or evidence that existed at the time of the initial release hearing but was not tendered for some reason that is legitimate and reasonable". This principle means that the reviewing judge can also refuse to admit new evidence "where it is alleged to have actually been in the interest of the accused to drag out the application for release or where the accused is alleged to have tried to use the review to engage in judge shopping".

[20] Not to be forgotten in all this is the over-arching protection accorded to every accused person under Canadian law to be presumed innocent unless otherwise proven.

[21] In *Antic, supra,* the Supreme Court of Canada stated at para. 1:

> [1] The right not to be denied reasonable bail without just cause is an essential element of an enlightened criminal justice system. It entrenches the effect of the presumption of innocence at the pre-trial state of the criminal trial process and safeguards the liberty of accused persons.

[22] Indeed, the *Canadian Charter of Rights and Freedoms* provides at s. 11 that any person charged with an offence has the right… (e) not to be denied reasonable bail without just cause; …

[23] In *R. v. Pearson*, [1992] 3 SCR 665, the Supreme Court of Canada held that:

> [45] …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".

Later, in the same judgment, Lamer, C.J. stated:

> [46] "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"…

[24] *Pearson*, also held that s. 11(e) of the *Charter* gives meaning to both s-s. 11(d) – the right to be presumed innocent until proven guilty, and s. 7 which guarantees life, liberty, and security of the person.

[25] Returning to *Antic*, Wagner, J. (as he was then), stated at para. 44, that:

> [44] …, the ladder principle requires that the form of release imposed on an accused be no more onerous than necessary. This principle is set out in s. 515(1) to (3) of the *Code*. Although these provisions are more strictly applicable in a contested bail hearing, they also provide the legal backdrop that should guide plans of release to which the parties consent.
>
> [My emphasis]

[26] In the case that is now before me, the accused agreed to restrictions on his movement that are normally only found in Conditional Sentence Orders, more commonly referred to as "house arrest". It would appear that for the past four plus months, he has complied with this condition.

[27] In a relatively recent decision from the Yukon Territorial Court, Territorial Court Judge, the Honourable Judge Heino Lilles (now retired), in the case of *R. v. Schab*, [2016] Y.J. No. 156; 2016 YKTC 69; 2016 CarswellYukon 163, at para. 19, had this to say:

> 19 Similar concerns are expressed in The Law of Bail in Canada, (The Honourable Mr. Justice Gary T. Trotter, 3rd ed., (looseleaf)). For example, it has been observed that bail conditions can be coercive and overused. Conditions are imposed when a promise to appear would suffice. Conditions are imposed for

> purposes unrelated to the bail system. Sometimes the conditions imposed are not practically enforceable.

Judge Lilles goes on to say, at para. 20:

> 20 At page 6-24, Justice Trotter states:
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> > The imposition of bail conditions must be approached with care. There may be a temptation on a bail hearing to right all the wrongs by intervening in a substantial way in the accused person's life. In these circumstances, a bail order begins to resemble a probation order or a conditional sentence. This is improper at the bail stage.

[28] The accused, Lonnie Marcelle Murphy, faces a number of significant *Criminal Code* and *CDSA* offences. He also possess a criminal record that includes convictions for theft (under $5,000.00); possession of stolen goods; fraud; uttering threats; mischief; a host of offences involving the dangerous operation of a motor vehicle; refusing the breathalyzer; and, driving while disqualified. However, these offences, as serious as they are, go back to 2001 and prior to then. Either Mr. Murphy saw the error of his way and stayed away from any involvement in criminal activity or was just plain lucky not to have been caught until these recent allegations surfaced. Regardless, he appears to have kept his nose clean for almost 16 years.

[29] I am satisfied, that since agreeing to the recognizance with conditions in October of last year, circumstances have changed. Mr. Murphy has demonstrated a respect for court orders by complying with the conditions included in the recognizance. There are no allegations that he has breached those conditions.

[30] The other change is that Mr. Lawrence Bugbee, a family friend who operates his own carpentry and general contracting business, is willing to employ Mr. Murphy as a labourer. Based on Mr. Bugbee's evidence, he has worked with Mr. Murphy in the past. He also indicated that he is acquainted with Mr. Murphy's mother and uncle and some other members of Mr. Murphy's family.

[31] Mr. Bugbee is also aware of the many offences Mr. Murphy is facing and the fact that he has a criminal record for past infractions. He is, nonetheless, willing to offer Mr. Murphy employment even though the work could involve access to private property. Mr. Bugbee indicated he has no concerns in having Mr. Murphy with him on a job site.

[32] Based on these circumstances, I am prepared to order certain changes to the conditions of Mr. Murphy's release on a recognizance. Of course, the two sureties will have to agree to these changes before they can be allowed.

[33] Clause (g) of the recognizance will be changed to allow the accused, Mr. Lonnie Murphy, to be absent from his residence, where he presently resides with Susan Murphy at 5455 Kay Street in Halifax Regional Municipality, between the hours of 6:00 a.m. and 6:00 p.m. Monday to Thursday, inclusive, PROVIDED:

1. He is working at a job site with Mr. Bugbee or is travelling to the site or home again by the most direct route possible and in the company of Mr. Bugbee.

2. Mr. Murphy is to advise Halifax Regional Police at (902) 490-3600 of the location or locations where he will be working at least 24 hours in advance unless it is an emergency call-out, then notice should be provided as soon as reasonably possible in advance of departing for the job site or while en route. If Mr. Murphy moves from one job site to another during the course of the day he is to notify Halifax Regional Police accordingly. Transportation between job sites need not always be provided by Mr. Bugbee. It can be someone else with whom Mr. Murphy is working on a particular job. But preferably, it would be Mr. Bugbee who provides transportation between job sites as well as to and from work at the beginning and at the end of each day.

3. The other exceptions set out in clause (g) are to remain including the four hour window of opportunity accorded Mr. Murphy on Thursday each week to attend to personal needs. In other words, if Mr. Murphy is not working on Thursday he still has the four hour window between 4 p.m. and 8:00 p.m. to attend to personal needs and, if he is working that day, then he still has until 8:00 p.m. to attend to his personal needs.

[34] At all other times, Mr. Murphy will be required to remain in his mother's residence at 5455 Kay Street in Halifax Regional Municipality and be available to prove compliance in accordance with clause (h) of the existing recognizance.

[35] Lawrence Bugbee must initial the changed provisions to acknowledge his understanding and acceptance of the responsibility that he is undertaking. In all other respects the existing recognizance is to remain as presently drafted.

McDougall, J.