Case Name:

R. v. Mott

Between
Her Majesty the Queen, Applicant, and
David Robert Mott Jr., Respondent

[2013] O.J. No. 1631

2013 ONSC 1768

Court File No. 431/12

Ontario Superior Court of Justice

L.L. Gauthier J.

Heard: February 21, 2013.
Judgment: April 3, 2013.

(46 paras.)

Criminal law -- Criminal Code offences -- Weapons offences -- Possession of weapon for dangerous purpose -- Offences against person and reputation -- Assaults -- Assault with a weapon -- Offences against rights of property -- Breaking and entering -- Being unlawfully in a dwelling-house -- Application by Crown for order Justice of the Peace erred in refusing to vacate original recognizance, substituting surety and failing to conclude Crown required notice allowed -- Accused, charged with being unlawfully in dwelling-house, assault with weapon and possession weapon for dangerous purpose, was released to surety -- Surety withdrew under s. 766 and Order of Committal issued under s. 766(2) -- This engaged s. 769 so new bail hearing required -- s. 767.1 no longer available as substitution was alternative to committal order -- Crown entitled to make representations, so should have received notice.

Criminal law -- Compelling appearance, detention and release -- Judicial interim release or bail -- Conditions of release -- Review of -- Release or detention after trial or pending appeal -- Warrant of committal -- Application by Crown for order Justice of the Peace erred in refusing to vacate original recognizance, substituting surety and failing to conclude Crown required notice allowed -- Accused, charged with being unlawfully in dwelling-house, assault with weapon and possession weapon for dangerous purpose, was released to surety -- Surety withdrew under s. 766 and Order

of Committal issued under s. 766(2) -- This engaged s. 769 so new bail hearing required -- s. 767.1 no longer available as substitution was alternative to committal order -- Crown entitled to make representations, so should have received notice.

Criminal law -- Prosecution -- Role of the Crown -- Application by Crown for order Justice of the Peace erred in refusing to vacate original recognizance, substituting surety and failing to conclude Crown required notice allowed -- Accused, charged with being unlawfully in dwelling-house, assault with weapon and possession weapon for dangerous purpose, was released to surety -- Surety withdrew under s. 766 and Order of Committal issued under s. 766(2) -- This engaged s. 769 so new bail hearing required -- s. 767.1 no longer available as substitution was alternative to committal order -- Crown entitled to make representations, so should have received notice.

Application by the Crown for an order that the Justice of the Peace erred in refusing to vacate the original recognizance, substituting a surety and failing to conclude the Crown required notice. The Crown had first applied for a bail review, but now agreed the accused could remain at large on recognizance. The accused was charged with being unlawfully in a dwelling house, assault with a weapon and possession of a weapon for a dangerous purpose. The original release conditions required the accused to reside with his stepmother but, five days after the bail hearing, she withdrew as his surety pursuant to s. 766 of the Criminal Code. An Order of Committal was issued pursuant to s. 766(2) and the accused turned himself in and was jailed. Two proposed sureties were found to be improper because of criminal records. The Crown wanted the bail order vacated but the Justice of the peace refused and indicated the Crown would be notified and able to cross-examine any proposed surety. However, days later, the Justice of the Peace found a simple substitution could be made without a bail hearing and substituted the accused's mother's boyfriend as surety.

HELD: Application allowed. The need for a new judicial interim release hearing reflected the importance of the suitability and duty of a surety. The nature of the relationship between the surety and accused was relevant to suitability. Once the surety withdrew and the accused was imprisoned, the recognizance was vacated, s. 769 was engaged and a new bail hearing was required. As the accused was committed under the Order of Committal, s. 767.1 was not available for simple substitution of surety, as s. 767.1 was an alternative to a committal order. The Justice of the Peace was not permitted to amend a release order where a surety was named within. Furthermore, the Crown was entitled to make representations about the suitability of a proposed surety, even in substitution proceedings, so was required to receive notice.

Statutes, Regulations and Rules Cited:

Criminal Code of Canada, R.S.C. 1985, c. C-46, s. 14, s. 515(10), s. 521, s. 706, s. 766(1), s. 766(2), s. 766(3), s. 766(4), s. 767.1, s. 769

Crown Attorney's Act, s. 11(i)

Counsel:

Susan K. Stothart, for the Crown.

Denis Michel, for the Respondent.

L.L. GAUTHIER J.:--

Overview:

1 On November 22, 2012 David Mott was released on bail, with his stepmother acting as his surety. His release conditions were strict, and included a specific requirement that he reside with his stepmother and abide by her rules. She withdrew five days after the bail hearing. Two other proposed sureties came forward, but they were not suitable. A third person was ultimately substituted for the original surety.

2 On December 19, 2012, the Crown brought an Application for a bail review, pursuant to s. 521 of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46. The Crown sought an Order detaining the Respondent in custody until his charges had been dealt with. In addition, the Crown sought an Order permitting it to cross-examine at large the proposed surety to ensure that the primary, secondary, and tertiary grounds were addressed.

3 The matter was ultimately heard by me on February 21, 2013. At that time, the Crown agreed that the Respondent could remain at large on his own Recognizance, however, the Crown requested that this court find that Justice of the Peace Bubba erred by (a) refusing to vacate the original Recognizance, (b) substituting the surety and disregarding the conditions of the Recognizance that was in place and (c) failing to conclude that the Crown must receive notice of a proceeding pursuant to section 767.1 of the *Criminal Code* (substitution of a surety).

Facts:

4 The facts, which are largely not in dispute, are set out in the Affidavit of Leticia Pileggi, sworn on December 18, 2012. I will highlight only the most salient facts and I will borrow extensively from the Affidavit.

5 David Mott was charged with Robbery, Being Unlawfully in a Dwelling House, Assault with a Weapon and Possession of a Weapon for a Dangerous Purpose, on or about November 10, 2012. He was detained in custody.

6 On November 22, 2012, at a contested bail hearing where the onus was on the Crown, David Mott admitted that he was an oxycontin and cocaine addict. His stepmother, Sandra MacDonald, offered herself up as a surety. At the time, she had been involved with David Mott and his father for three years.

7 The bail plan was that David Mott would live with Sandra MacDonald and David Mott's father at their residence on Red Deer Lake Road in Wahnapitae, outside the City of Greater Sudbury. David Mott would be required to reside at the MacDonald-Mott residence, and he would not be permitted to be outside that residence without the surety. In addition to other conditions, he was to attend treatment. Justice of the Peace Logue, who was the presiding Justice at the bail hearing, explained the strict conditions to David Mott as a means of "putting a structure around you ..."

8 On November 27, 2012, Sandra MacDonald withdrew as a surety. She did so by completing an Application By Surety For Relief, pursuant to s. 766 of the Criminal Code. This is referred to as the "rendering of an accused by a surety."

9 On that same date, an Order for Committal was issued by Justice of the Peace Toulouse for David Mott's arrest (again, pursuant to s.766). The Order for Committal was executed later that day, as per s. 766(2), after David Mott turned himself in. The Order bears the following notation:

> Executed 27 November 2012
>
> At 1810 hrs
>
> Cst. Ferguson #92611 GSPS

10 There follows the signature of Constable Ferguson.

11 David Mott appeared in bail court on November 28, 2012, at which time the matter was adjourned to November 29, 2012. On that date Miranda Lavigne (18 years old) applied to be David Mott's surety.

12 Although Miranda Lavigne swore an Affidavit of Justification by a Surety, indicating that she did not have a criminal record, a CPIC search revealed that in fact she had been found guilty of Break and Enter as a youth in 2012.

13 A new surety was proposed for David Mott, in the person of Vicky Mott, David Mott's mother. The verification process revealed that Vicky Mott had a criminal record, having been convicted of Fraud Over $5,000, in 2006.

14 On November 29, 2012, in bail court, the Crown requested that the court vacate David Mott's bail order made on November 22, 2012, pursuant to s. 766 of the *Criminal Code*, in light of the

withdrawal of Sandra MacDonald as surety for David Mott.

15 The presiding Justice of the Peace refused to vacate David Mott's November 22, 2012 Recognizance order. He did, however, indicate that if a new surety were to be proposed for David Mott, that the Crown should be notified and have the opportunity to cross-examine such proposed surety.

16 During the November 29, 2012 proceedings, the presiding Justice of the Peace referred to and relied upon the decision in *R. v Alexander*, 2012 ONSC 3792, [2012] O.J. No. 2932, for the proposition that David Mott was entitled to a simple surety substitution without having to undergo a new bail hearing, subject to the suitability of the surety.

17 The Justice of the Peace said this:

> In conclusion, essentially, section 766 of the *Criminal Code* procedure cancels the sureties and requires the defendant to remain in custody until sureties are obtained and that they satisfy the requirements of the recognizance ... the defendant's recognizance has not been cancelled despite the procedure under section 766 being followed and the defendant being held in custody.

18 Also during the course of the November 29, 2012 proceedings, the presiding Justice of the Peace appeared to suggest that the Crown is not entitled to notice of a proposed substitution of a surety, pursuant to s. 767.1 of the *Criminal Code*. The Justice of the Peace pointed out that there was no provision in the *Criminal Code* for such notice to be given to the Crown, although he did acknowledge the Crown's duty, pursuant to s. 11(i) of the *Crown Attorney's Act*, to inquire into the suitability of proposed sureties.

19 On December 4, 2012, Jules Soenens presented himself as a possible surety for David Mott. At the time, Jules Soenens had been dating David Mott's mother for approximately twelve months. David Mott had never been to Jules Soenens's home, and Jules Soenens had no information about David Mott's drug rehabilitation plan.

20 The presiding Justice of the Peace released David Mott with the substituted surety, Jules Soenens.

Issues:

21

A) Whether the Justice of the Peace erred in refusing to vacate the original Recognizance, and concluding that Sandra MacDonald's withdrawal as a surety, pursuant to s. 766 of the *Criminal Code*, resulted only in the "cancellation" of the surety, with substitution being possible, without having to apply for release all

over again.

B) Whether the Justice of the Peace erred in concluding that the Crown is not entitled to notice (absent an Order) of a hearing for a substitution of a surety pursuant to s. 767.1.

Statutory Framework:

22 Section 766*Criminal Code*- Render of accused by sureties:

766.(1) A surety for a person who is bound by recognizance to appear may, by an application in writing to a court, justice or provincial court judge, apply to be relieved of his obligation under the recognizance, and the court, justice or provincial court judge shall thereupon issue an order in writing for committal of that person to the prison nearest to the place where he was, under the recognizance, bound to appear.

Arrest

(2) An order under subsection (1) shall be given to the surety and on receipt thereof he or any peace officer may arrest the person named in the order and deliver that person with the order to the keeper of the prison named therein, and the keeper shall receive and imprison that person until he is discharged according to law.

Certificate and entry of render

(3) Where a court, justice or provincial court judge issues an order under subsection (1) and receives from the sheriff a certificate that the person named in the order has been committed to prison pursuant to subsection (2), the court, justice or provincial court judge shall order an entry of the committal to be endorsed on the recognizance.

Discharge of sureties

(4) An endorsement under subsection (3) vacates the recognizance and discharges the sureties.

R.S., 1985, c. C-46, s. 766; R.S., 1985, c. 27 (1st Supp.), s. 203.

Section 767*Criminal Code*- Render of accused in court by sureties:

767. A surety for a person who is bound by recognizance to appear may bring that person into the court at which he is required to appear at any time during the sittings thereof and before his trial and the surety may discharge his obligation under the recognizance by giving that person into the custody of the court, and the court shall thereupon commit that person to prison until he is discharged according to law.

R.S., c. C-34, s. 701.

Section 767.1*Criminal Code*- Substitution of surety:

767.1 (1) Notwithstanding subsection 766(1) and section 767, where a surety for a person who is bound by a recognizance has rendered the person into the custody of a court pursuant to section 767 or applies to be relieved of his obligation under the recognizance pursuant to subsection 766(1), the court, justice or provincial court judge, as the case may be, may, instead of committing or issuing an order for the committal of the person to prison, substitute any other suitable person for the surety under the recognizance.

Signing of recognizance by new sureties

(2) Where a person substituted for a surety under a recognizance pursuant to subsection (1) signs the recognizance, the original surety is discharged, but the recognizance and the order for judicial interim release pursuant to which the recognizance was entered into are not otherwise affected.

R.S., 1985, c. 27 (1st Supp.), s. 167.

Section 769*Criminal Code*- Application of judicial interim release provisions:

769. Where a surety for a person has rendered him into custody and that person has been committed to prison, the provisions of Parts XVI, XXI and XXVII relating to judicial interim release apply, with such modifications as the circumstances require, in respect of him and he shall forthwith be taken before a justice or judge as an accused charged with an offence or as an appellant, as the case may be, for

> the purposes of those provisions.
>
> R.S., c. C-34, s. 703; R.S., c. 2(2nd Supp.), s. 14.

Analysis:

23 Two diametrically opposed positions have been put forward. I understand why, as the state of the law in this area to date has been somewhat unclear. It is my hope that this decision, alongside the decision of my brother Dambrot J. in *R. v. Smith* 2013 ONSC 1341, [2013] O.J. No. 1057, will bring some clarity to this issue.

24 The Crown submits that the *Criminal Code* sections dealing with the rendering of an accused by a surety are a codification of the common law. At common law, when an accused was rendered by his surety, he was in the same position as if he had yet to apply for bail. *R. v. Burke* (1893), 24 O.R. 64.

25 At page 195 of G. Trotter, *The Law of Bail in Canada* (Toronto: Carswell, 1992) the author writes "Being rendered requires the incarcerated accused to apply for release all over again."

26 The Crown points to s.766(4) which provides that the procedure in s. 766(1), (2), and (3) results in the Recognizance being vacated, in addition to the surety being discharged. The provisions of s.769 are therefore engaged and a new bail hearing must be held, they argue.

27 The opposing view is based on *R. v. Alexander,* which I mentioned earlier. The headnote in that case provides an accurate and succinct summary of the facts and findings, as follows:

> Application by Alexander for a bail review. Alexander was in custody awaiting trial in November 2012. He was awaiting trial on three charges for offences allegedly committed while he was on bail. At the initial bail hearing on the current charges, in April 2011, the justice of the peace found that the Crown had not established that detention was required, but that the sureties proffered by Alexander were inappropriate. In May 2011, Alexander presented new sureties and was released on a recognizance with three sureties. In November 2011, after Alexander was committed to stand trial, his sureties applied to be released from their obligations. Alexander then consented to detention. He now applied with new sureties.
>
> HELD: Application dismissed, but extraordinary remedy granted. Alexander was unlawfully deprived of his liberty. As of the initial bail hearing, a valid release order under subsection 515(2) of the Criminal Code existed. That valid order still existed when the detention order under subsection 515(6) was made. Further, the

> subsection 766(1) committal order in November 2011 was made without a sheriff's certificate or a committal endorsement, thereby blocking any vacation of the recognizance and preventing substitution of a successive recognizance. The appropriate remedy was habeas corpus with certiorari in aid. The subsection 515(6) detention order was quashed and the recognizance was vacated. The subsection 515(2) order remained in effect.

28 Justice C. Hill, at paragraph 35 of *Alexander* says this:

> ... a s. 766(1) committal does not justify an entirely new bail hearing where, as here, the accused would again have the burden of showing why he ought to be ordered released. The rendering action of a surety cannot act to shift the burden the Crown would otherwise bear to challenge the legitimacy of an existing release order. Section 769, importing the provisions of Part XVI of the Code properly interpreted ("with such modifications as the circumstances require"), means that a s. 766(1) "committal", not a "detention", returns an accused to the status he had of having a release order in hand ... awaiting fulfilment, if possible, by the production of new sureties approved by a releasing justice pursuant to s. 519(1)(b) of the Code.

29 Since the hearing of the Application on February 21, 2013, I have had the benefit of reading the decision of my brother, M. Dambrot J. in *R. v. Smith*, which he heard on February 21, 2013 as well.

30 The issues before Dambrot J. were very similar to those in the case before me. In *Smith*, as on the facts before me, the surety was named in the release order, and, it was a condition of that order that the accused person reside at the address of the surety. That was not the case in *Alexander*. *Alexander* may be further distinguished: unlike *Smith*, and unlike the case before me, there was no Sheriff's Certificate or other modern-day equivalent certification that the accused had been committed to prison.

31 In *Smith*, Dambrot J. disagreed with the conclusion reached in *Alexander*. He concluded, at paragraph 34, that s. 769:

> "provides that where an accused has been rendered into custody and committed to prison, the judicial interim release provisions apply, modified to fit the circumstances, and the accused must forthwith be brought before a judge or justice *as an accused charged with an offence* for the purpose of the judicial interim release provisions."

32 I prefer the approach taken in *Smith*, and I commend the case to the parties, in particular the thorough and thoughtful analysis which begins at paragraph 14 of the decision.

33 Further, I would emphasize that in *Smith*, Dambrot J. points out at paragraph 35 that several other judges and authors have concluded that a new bail hearing is required when an accused has been rendered by a surety and committed to prison.

34 The court, in *Smith*, further points out, at paragraphs 50 and 51 that:

> ... where a surety is named, he or she is named 'in the order'. As a result, a justice who is otherwise authorized to substitute one surety for another cannot do so where the surety is named. In such a case, the justice would be amending the underlying release order, something that the justice is not authorized to do. The fact that the justice may not amend the release order is particularly clear from s. 767.1(2), which provides:
>
> > (2) Where a person substituted for a surety under a recognizance pursuant to subsection (1) signs the recognizance, the original surety is discharged, but the recognizance and *the order for judicial interim release pursuant to which the recognizance was entered into are not otherwise affected*. [Emphasis added]
>
> If there was any doubt, the emphasized words in s. 767.1(2) make plain that a simple substitution of sureties cannot take place where, as here, an accused is obliged by the release order to reside with his or her surety and the surety's address is specified.

35 The need for a new judicial interim release hearing on the rendering of an accused in David Mott's circumstances (i.e. with a named surety and conditions requiring the accused to reside with the surety) reflects the importance of the suitability of the surety, as well as the duty of a surety to ensure the accused's presence in court for trial, and to otherwise supervise the accused and ensure his or her compliance with the conditions in the release order.

36 In addition to the surety's character, the nature of the relationship between the surety and the accused is directly related to the suitability of the surety. At page 198 of *The Law of Bail in Canada*, the author says this:

> On a view of the surety relationship that contemplates *any* degree of supervision of the accused, it is crucial to know whether the relationship is one which will realistically permit the infusion of these obligations and their potential enforcement. Thus, it is important to inquire beyond the mere formalities of the surety's relationship with the accused and determine its nature. Factors such as how long the surety has known the accused, whether they are related, how frequently they see each other and how close they live to one another should give

> some indication of how well a surety can be expected to supervise an accused and take action if the accused fails to live up to the conditions of his or her release.

37 As the passage above suggests, the Justice of the Peace's observations and analysis of a proposed surety's suitability are often of central importance to the release process. A *particular* surety, who is shown to know the accused well and who the Court is satisfied will be able to provide the supervision and consequences necessary for the surety relationship to function, may make the difference between incarceration and release, by satisfying one or all of the grounds pursuant to s. 515(10) of the Criminal Code.

38 On November 29, 2012, after Sandra MacDonald had availed herself of the provisions of s. 766(1) of the *Criminal Code*, and after David Mott had turned himself in and had been imprisoned pursuant to s. 766(2) and pursuant to the Committal Order made by Justice of the Peace Toulouse, s. 769 was engaged and David Mott was required to have a new bail hearing. The Recognizance of November 22, 2012 was effectively vacated, although the release order remained in place.

39 The provisions of s.767.1, which allow for the substitution of a surety without a new bail hearing, were not available to David Mott, as he was already committed to prison pursuant to the Committal Order. The substitution of a surety pursuant to s. 767.1 is only available as an *alternative* to a committal order.

40 I would add that, although I disagree with the conclusion reached in *Alexander,* I agree with the suggestion made at paragraph 30 of that case that the practice of writing or printing the word "Executed" on the Committal Order, together with the date, time, name, and badge number of the officer, "appears to be the modern-day version of the s. 766(3) sheriff's 'certificate' that the person has been committed to prison" pursuant to a Committal Order.

41 With regard to the issue of notice to the Crown, I agree with Dambrot J. in *Smith* that when an accused is rendered by his surety and committed to prison, he is returned to his pre-release status and is required to be brought before the court which has jurisdiction to deal with the issue of interim release. Part XVI of the *Criminal Code* is engaged, and the Crown must receive notice.

42 With regard to the procedure for a substitution of a surety pursuant to s. 767.1, Dambrot J. in *Smith*, stated that notice should be given to the Crown, and the Crown should be provided with an opportunity to appear and make submissions. I agree.

43 A slightly different scenario may arise when the justice conducting the bail hearing orders the release of the accused on a Recognizance with a surety or sureties, without naming them. The issue of the suitability of any proposed sureties will then be left to the Justice of the Peace who takes the Recognizance. The Justice will inquire into the suitability of proposed sureties. This is an important task and the Justice should be assisted by the Crown Attorney.

44 This was made clear by Chadwick J. at page 166 of *R. v. Dewsbury* (1989), 50 C.C.C. (3d) 163 (Ont. H.C.J.), where he was considering section 12(j) (now 11(j)) of the *Crown Attorneys Act*:

> Section 12(j) must be interpreted in light of Part XVI of the Criminal Code which permits the Crown Attorney to make representations before the court as to the sufficiency of the sureties that are being presented. A justice of the peace or judge hearing the bail application will make the final determination as to the adequacy of the sureties ... Representations made by the Crown Attorney relating to the adequacies of the sureties will no doubt carry great weight.

45 Although Chadwick J. was making reference to a bail hearing, I suggest that the Crown Attorney is entitled to make representations to a justice of the peace who is taking the Recognizance and considering the suitability of sureties who were not named in the release order. The importance of the suitability of the surety is not diminished by the surety not having been named in the release order.

46 **<u>Conclusions:</u>**

1. Where an accused is rendered by his surety, pursuant to s. 766 or 767, and an accused is committed to prison pursuant to s. 767(2) of the *Criminal Code*, the Recognizance is vacated (although the release order remains) and the surety is discharged.
2. Where an accused is rendered by his surety and committed to prison pursuant to s. 767(2) of the *Criminal Code*, s. 769 of the *Code* applies and a new bail hearing will be required.
3. Where an accused is rendered by his surety and committed to prison, the procedure under s.767.1 of the *Criminal Code* for the substitution of a surety (without a new bail hearing) is NOT available to the accused. Section 767.1 is an alternative to committal.
4. Where a surety is named in the release order, a justice who is otherwise authorized to substitute one surety for another, is precluded from doing so. A justice may not amend a release order.
5. The Crown is entitled to notice of an application made pursuant to s.767.1 of the *Code*, and is entitled to make representations to a justice presiding over such application.
6. The Crown is entitled to notice of any hearing or process involving the assessment, by a justice, of the suitability of proposed sureties, and to make representations in that regard.

L.L. GAUTHIER J.