THE BAIL REFORM ACT: RECENT CASE LAW

*Bruce Simpson**

I. INTRODUCTION

The present paper is concerned with those decisions to date [1] which have dealt with the interpretation and application of the new provisions regarding bail or "judicial interim release" as it is now called. [2] It should be pointed out that this is a survey of the case law in this area and not an attempt to discuss the provisions on a section by section basis. For such treatments of the law the reader is referred to the works of Powell [3] and of Scollin. [4]

II. BURDEN OF PROOF

A. Generally

There can be little doubt on a reading of section 457 [5] that the onus of justifying the detention of the accused, or his release on conditions or undertakings rather than unconditionally, rests on the Crown. There appears to be a general judicial agreement that the new provisions are to be liberally construed in favour of the accused. This position is well stated by Mr. Justice Anderson in *R. v. Thompson:* [6]

> Parliament must be taken to have assumed the risk that under the new legislation it would be to some degree less likely that as many persons would appear for trial as would be the case under the old system. Parliament must also be taken to have assumed that it was better to take the aforesaid risks than to keep large numbers of accused persons in custody pending trial.

This statement has been approved in a number of reported decisions. [7] A statement suggesting that the general considerations for determining whether or not release should be granted have not been substantially altered by the new legislation is to be found in the judgment of Mr. Justice Munroe in *R. v. Riach.* [8] In upholding a detention order in that case he said:

---

* of the Board of Editors.

[1] January 31, 1974.

[2] The Bail Reform Act, CAN. REV. STAT. 2d Supp. c. 2 (1970).

[3] C. POWELL, ARREST AND BAIL IN CANADA (1972).

[4] J. SCOLLIN, THE BAIL REFORM ACT (1972).

[5] All §§ references are to present sections of the Criminal Code of Canada.

[6] 7 Can. Crim. Cas.2d 70, at 71-72 (B.C. Sup. Ct. 1972).

[7] *For example,* R. v. Saggar, note 22 *infra* at 379 and R. v. Bellerose, note 51 *infra* at 72.

[8] 9 Can. Crim. Cas.2d 110, at 111 (B.C. Sup. Ct. 1972).

> It has long been the practice in B.C. courts to grant or refuse bail pending trial upon a determination of the likelihood or otherwise of the accused appearing to stand his trial and . . . the likelihood or otherwise of the accused committing another serious offence if released from custody. The recent amendments to the Criminal Code merely codified those principles and made it clear that any doubt . . . were to be resolved in favour of the applicant for bail.

It is submitted that the above statement by Munroe and that of Anderson in the *Thompson* case are not as expressive of different approaches to the interim release provisions as might appear when the quotations are taken out of the context. The remarks of Anderson are directed principally at the primary ground for detention set out in section 457(7)(*a*), that detention is necessary "to ensure his [the accused's] attendance in court to be dealt with according to law." The remarks of Munroe, on the other hand, are largely referable to the secondary ground for detention set out in section 457(7)(*b*), that detention "is necessary in the public interest or for the protection or safety of the public." The secondary ground is only to be considered after it has been determined that the accused should not be detained on the primary ground. [9] It is submitted that it is proper to say that Parliament intended to take a greater risk that some accused persons would fail to show for trial but that it is a different matter to say that Parliament intended to take greater risks with the safety of the public and it is suggested that justices should exercise greater caution where the Crown produces evidence indicating that detention is required on the secondary ground.

B. Detention to Ensure Attendance at Trial

While the Crown has the primary onus of justifying an order other than unconditional release, the Crown need not prove its case beyond a reasonable doubt but only on the balance of probabilities. As is pointed out by Mr. Justice Gillis in *R. v. Julian* [10] it would be unreasonable to place a greater burden on the Crown at such an early stage in the proceedings. It remains somewhat unclear, however, just what the Crown must show "on the balance of probabilities."

---

[9] Section 457(7) reads in full:
For the purposes of this section, the detention of an accused in custody is justified only on either of the following grounds, namely:
(a) on the primary ground that his detention is necessary to ensure his attendance in court in order to be dealt with according to law; and
(b) on the secondary ground (the applicability of which shall be determined only in the event that and after it is determined that his detention is not justified on the primary ground referred to in paragraph (a) that his detention is necessary in the public interest or for the protection or safety of the public, having regard to all the circumstances including any substantial likelihood that the accused will, if he is released from custody, commit a criminal offence involving serious harm or an interference with the administration of justice, CAN. REV. STAT. 1970 (2nd Supp.), c. 2, s. 5.

[10] 20 Can. Crim. (n.s.) 227, at 229 (N.S.C.C. 1972); *see also* R. v. Carbone 20 Can. Crim. (n.s.) 313 (Ont. County Ct. 1972).

With reference to the primary ground that conditions or detention are necessary "to ensure" that the accused will attend at trial, it could be argued that the term "to ensure" means that the Crown need only lead evidence which raises a substantial doubt that the accused would appear for trial. However, if the new provisions are to be interpreted liberally in favour of the accused and if, as stated by Anderson in *R. v. Thompson,*[11] Parliament must be taken to have assumed the greater risk of accused persons failing to appear, then it can be argued that the Crown should be required to show that it is more likely that the accused will fail to appear than that he will appear. It is submitted that the most reasonable approach would be to require only that the Crown raise substantial doubts that an accused may appear before ordering conditions for release but that the Crown should be required to show that it is more likely than not that the accused will fail to appear even if conditions are imposed, before ordering detention on the primary ground. Such an approach, it is submitted, would best reconcile the opposing considerations and would be in accordance with the spirit of the interim release provisions even if there is no clear statutory authority for such an approach. An accused must be presumed to be innocent until convicted and he should not be jailed to await trial unless there are very good reasons for detention. Considerable damage could be caused to an innocent person by his detention pending trial especially when, as occasionally happens, his trial is unduly delayed. There is an immediate loss of enjoyment of life, of income earning opportunities and there may also be predjudice to future income by loss of employment or by loss of an employment or promotion opportunity. There can also be serious psychological and social repercussions, not only for the accused, but for his relatives as well. On the other hand, an accused person is not likely to be seriously predjudiced or even greatly inconvenienced by being asked to comply with conditions that will better ensure his attendance at trial. It is submitted that it would not be contrary to the spirit of the law to require only that the Crown raise substantial doubts before a justice orders a conditional release. Indeed, if the imposing of conditions has the intended effect then one would expect that this will result in fewer detentions. The willingness or reluctance of justices to release accused persons will undoubtedly be effected by the percentage of persons who fail to appear for trial when scheduled.

A review of the reported cases has failed to produce a single instance of a detention order which stood up on review where the only reason for detaining the accused was that he might not appear for trial. In *R. v. Riach*[12] the accused was ordered detained on both grounds set out in section 457(7), though, as the secondary ground is only to be considered if the Crown fails to show cause on the primary ground, technically the accused was detained to ensure his attendance at trial. However, in giving his reasons for refusing to vacate a detention order Mr. Justice Munroe ap-

[11] *Supra* note 6.
[12] *Supra* note 8.

peared to be more concerned with matters relevant to the secondary ground for detention. In any case, the facts in the case were such that even the most liberal application of the law could hardly have resulted in release. The accused, in his mid-twenties, faced two charges of armed robbery allegedly committed while he was on parole. He had fifteen previous convictions including escape from lawful custody and skipping bail and had already served eight prison sentences.

In *R. v. Smith* [13] the accused was ordered detained on the ground that the accused would be unlikely to appear for his trial but again there was evidence which would have made a strong case for the Crown on the secondary ground and it is unlikely that the judge was not greatly influenced by considerations of public safety. The accused, who had a serious criminal record involving crimes of violence, was charged with the murder of at least two persons, [14] the apparent motive for which was robbery. In addition, the accused was chronically unemployed, habitually associated with known criminals and was a drug addict.

In *R. v. Thompson* [15] the accused was arrested in Vancouver and charged with possession of marijuana for the purpose of trafficking. The provincial court judge ordered detention to ensure attendance at trial when it was shown that the accused had "no roots in the community." The accused had been in the Vancouver area only about six weeks having come there from Toronto. He was unemployed and had no permanent address in the province. On an application for review, the detention order was vacated and the accused was released on certain undertakings. It was held that where the accused had no previous record and the offence was not particularly serious (the "street value" of the illicit drug was about $270.00), the absence of roots in the community was not sufficient grounds to warrant detention but that some additional evidence indicating that the accused is unlikely to appear was necessary.

In *R. v. Horvat,* [16] Mr. Justice Vercheres ordered the unconditional release of the accused on review pursuant to section 457 where the only reasons given by a Provincial Court Judge for requiring that a bond or cash be posted was that the accused had "no roots in the Community."

Both the *Thompson* and *Horvat* cases would seem to indicate that the Crown will need cogent positive evidence that an accused is unlikely to appear before detention is ordered to ensure his attendance. It seems that the kinds of factors which would indicate that an accused might fail to appear (*e.g.,* a lengthy previous record or the fact that the alleged offence was relatively serious so that a lengthy prison sentence is possible) are also relevant to the secondary ground. It is submitted that a review of reported

---

[13] 8 Can. Crim. Cas.2d 291 (B.C. Sup. Ct. 1972).

[14] It is not stated in the case how many victims there were except that the plural is used.

[15] *Supra* note 6.

[16] 9 Can. Crim Cas. 1 (B.C. Sup. Ct. 1972).

decisions indicates that detention is more likely to be ordered on the secondary ground. In only two reported decisions, the *Riach* [17] and *Smith* [18] cases discussed above, was detention ordered on the primary ground and in both of these cases the judges were undoubtedly influenced by considerations more relevant to public interest and protection as well as by evidence that the accused persons might fail to appear. In all other reported cases where detention was ordered it was ordered on the secondary ground.

C. Detention Necessary in the Public Interest

To succeed in justifying detention on the secondary ground the Crown must show, on the balance of probabilities, [19] that detention is necessary "in the public interest or for the protection or safety of the public, having regard to all circumstances, including *any substantial likelihood* that the accused will, if he is released from custody, commit a criminal offence involving serious harm or an interference with the administration of justice." [20] The term "any substantial likelihood" would appear to mean that the Crown is not required to show that an offence involving "serious harm" or an interference with the administration of justice will more likely occur than not but only that there are reasonable and cogent grounds to fear that such might occur. Moreover, it is submitted that circumstances which would justify detention will vary not only with the probability that a serious offence will be committed, but also with the nature of the "harm" which is feared.

If the case of *R. v. Carbone* [21] is rightly decided, it would appear to support the propositions stated in the preceding paragraph. In that case, County Court Judge Rogers held that where the accused faced two charges of rape committed against two different victims on two separate occasions, there was sufficient grounds to warrant detention in the public interest. It is submitted that in the absence of any previous criminal record or a psychiatric report or other additional evidence indicating violent tendencies, it cannot be logically said that if the accused were released then, on the balance of probabilities, the offence would be repeated. It seems more correct to say that the learned judge had good reason to fear that the offence might be repeated. It is also suggested that if the offences had been serious but did not involve violence, for example breaking and entering, that there would not have been sufficient grounds to warrant detention. Similar observations may be made about *R. v. Sagger* [22] where the accused was ordered detained only on the basis of the circumstances surrounding an alleged murder. The victim was a stranger to the accused and the incident apparently arose over a quarrel about who was to have the last available seat in a beer parlour.

---

[17] *Supra* note 8.
[18] *Supra* note 13.
[19] R. v. Julian, *supra* note 10.
[20] *Supra* note 9.
[21] 20 Can. Crim. (n.s.) 313 (Ont. County Ct. 1972).
[22] 7 Can. Crim. Cas.2d 328 (B.C. Sup. Ct. 1972).

In *R. v. Julian*[23] the accused was charged on three counts of non-capital murder. The accused had violently resisted arrest and wounded a police officer in doing so. In giving his reasons for ordering that the accused be detained Mr. Justice Gillis said: "An arguable case could be made out for refusing release under section 457(7)(*a*)." He then referred to the statement by Mr. Justice Anderson in *R. v. Thompson* to the effect that the new legislation contemplated the greater risk of accused persons failing to appear for trial. He then stated that "it is section 457(7)(*b*) which makes me feel that the applicant must be kept in custody for the protection and safety of the public." In stating his reasons in this manner Gillis appears to suggest that the primary ground for detention will be given a more liberal construction in favour of the accused than will the secondary ground.

D. Applications under Section 457.7

Where the accused is charged with a capital offence, an offence under sections 50-53, or an offence under sections 76.1 to 76.3 (aircraft hijacking and related offences), or non-capital murder he may only be released from custody on an application to a Superior Court Judge under section 457.7. The grounds for ordering a release with conditions or for ordering detention are the same as for an application under section 457 and the preceding discussion regarding the burden of proof on the Crown applies equally to applications brought under this section. However, the word "may" is used and it has been held that this gives the judge a discretion to refuse release even if the Crown fails to show cause within the meaning of section 457(7).[24]

In *R. v. West*[25] it was said that, although there was a residual discretion in the judge, the application should be granted unless the prosecutor presents some evidence in opposition to the application. In that case Mr. Justice Osler had ordered detention but on review pursuant to section 608.1 the majority in the Court of Appeal ordered that the accused be released taking into consideration that the alleged murder was not of a pre-meditated character and that the accused had voluntarily surrendered to the police.

In *R. v. Smith,*[26] the New Brunswick Court of Appeal reviewing an order of detention made pursuant to section 457.7 expressly exercised the discretion granted by that section. In that case the accused who had a previous criminal record was charged with non-capital murder. The alleged offence was committed while the accused had been drinking and it was shown that the accused had a serious alcohol problem and that he tended to have an uncontrollable temper when drinking. On the other hand there was evidence of provocation and the accused had voluntarily surrendered to the

---

[23] *Supra* note 10, at 379.

[24] R. v. West, 20 Can. Crim. (n.s.) 15 (Ont. 1972); R. v. Smith, 13 Can. Crim. Cas. 374 (N.B. 1973).

[25] *Id.* at 19.

[26] *Supra* note 24.

police. The majority exercised the discretion granted by section 457.7 and ordered detention though all three Justices of Appeal were of the opinion that the Crown had failed to prove its case for detention.

It is impossible to anticipate exactly how the discretion granted by section 457.7 will be used but it would appear from the *West* and *Smith* cases that there should be at least some cogent evidence beyond the fact that the accused has committed murder (or one of the other listed offences) that would justify detention. It is suggested in the West case that whether or not the crime appears to have been pre-meditated is relevant and certainly where, as in the *Smith* case, there is some evidence of a chronic health problem such as alcoholism which has resulted in violent tendencies, that will be relevant. Perhaps also the absence of "roots in the community" which has been held to be insufficient cause for detention by itself under section 457(7)(*a*) [27] would justify the exercise of the discretion granted by section 457.7.

III. Relevant Factors

A. Roots in the Community

It was said in *R. v. Thompson* [28] that whether the accused has a permanent residence or employment in the community, whether or not he has close friends or relatives in the community, and the accused's ability to obtain employment are all relevant considerations when determining whether detention should be ordered to ensure attendance at trial. However, it was also said in the same case and in *R. v. Horvat* [29] that the absence of such "roots in the community" is not by itself sufficient to warrant detention.

B. Previous Criminal Record

It is clear from a number of cases that the previous record of the accused is admissible evidence at the hearing and that it is relevant to both branches of section 457(7). A record of violent crimes will be particularly relevant to the secondary ground especially if the accused is charged with a further crime of violence. [30] A record which includes such offences as escaping custody and skipping bail are, of course, particularly relevant to the issue whether the accused is likely to appear at trial. [31]

C. Seriousness of the Offence

The seriousness of the offence with which the accused is charged has been held to be a relevant consideration to the primary ground for detention [32] as well as to the secondary ground. However it was held in *Holcomb*

---

[27] R. v. Thompson, *supra* note 6, and R. v. Horvat, *supra* note 16.
[28] *Id.*
[29] *Supra* note 16.
[30] R. v. Smith, *supra* note 13.
[31] R. v. Riach, *supra* note 8.
[32] R. v. Thompson, *supra* note 6.

v. The Queen [33] (attempted murder) and *R. v. McLelland* [34] (trafficking in heroin) that while relevant, the seriousness of the offence charged cannot alone warrant detention. However, in *R. v. Saggar* [35] the violent circumstances surrounding an alleged murder, as opposed to the simple fact that murder was alleged, was considered sufficient to justify detention in the public interest.

D. Meaning of "Harm"

It was held in *R. v. Menard* [36] that offences involving "serious harm" were not confined to offences involving harm to the person. In that case it was held that "house-breaking" and "safe-breaking" were criminal offences involving serious harm and where the accused had been repeatedly arrested for such offences while on bail then detention was justified in the public interest.

E. Meaning of "Public Interest"

In *Powers v. The Queen* [37] the accused was charged with possession of an illicit drug. The accused had been charged with a series of drug related offences, many of which were allegedly committed while on interim release (interim release had already been granted on three previous occasions). Mr. Justice Lerner was satisfied that the accused would appear for trial and that the offences that she was likely to commit involved no "serious harm" except to the accused herself. However, Lerner was of the opinion that the public image of the Criminal Code and the Bail Reform Act were important considerations. Detention was ordered on the reasoning that to release a person likely to commit criminal offences, even though harmful only to the accused, would lead to a disrespect for the law and the detention was therefore justified in the "public interest."

F. Breach of Conditions

In *Fulton and The Queen* [38] the accused was granted interim release with conditions. Two of the conditions, that he refrain from driving and that he keep a curfew, were broken. Section 458(5) provides that where an accused is brought before a justice having breached the conditions under which he was released the justice may cancel the order and grant a conditional release or order the accused detained if the Crown shows cause within the meaning of section 457(7). In this case the justice ordered detention on the grounds that the conditions had been breached. A writ of certiorari was sought on the argument that some additional evidence other than the

---

[33] 20 Can. Crim. (n.s.) 230 (N.B. Sup. Ct. 1972).
[34] [1973] 4 W.W.R. (n.s.) 446 (Alta. Sup. Ct.).
[35] *Supra* note 22.
[36] 19 Can. Crim. (n.s.) 6 (Ont. County Ct. 1972).
[37] 20 Can. Crim. (n.s.) 23 (Ont. High Ct. 1972).
[38] 10 Can. Crim. Cas.2d 120 (Sask. Q.B. 1972).

breach of conditions was required before the Crown could be said to have shown cause. The application for certiorari was dismissed on the grounds that as the conditions had been imposed for the protection of the public and the accused had shown an unwillingness to obey them there was some evidence on which the justice could find that detention was necessary in the public interest.

It is submitted that if an application for review had been brought under section 457.5 rather than an application for certiorari the result might have been different. Certainly where conditions are imposed to ensure attendance at trial or to protect the public then the breach of those conditions is good evidence that detention is necessary. However, since the Code provides for a new hearing rather than automatic detention when conditions are breached it would seem that a justice must at least consider all of the circumstances surrounding the breach and should also consider whether the accused is likely to continue to disobey the imposed conditions. Where the breach is a minor one, as for example being 20 minutes late for curfew, or if there are extenuating circumstances which would tend to justify or excuse the breach then detention should not be ordered. However, where the breach is flagrant and inexcusable it is submitted that a justice is not only justified in ordering detention, but normally should do so. It would be nonsense for a justice to impose conditions which he feels the public interest requires knowing that they will likely be ignored.

G. Deterrence

In *R. v. Thompson* [39] a detention order was made on the grounds, inter alia, that there was a need to curb drug trafficking in the Vancouver area. On review, Anderson in granting a conditional release took the position that deterrence is an irrelevant consideration re interim release and that, as an accused must be presumed to be innocent, sentencing alone is the proper mode for deterrence. Lerner in discussing factors relevant to "public interest" in the *Powers* case mentioned "the attempts at deterrence of crime." [40] However, Lerner may have been thinking of the function of the criminal law generally. It is submitted that the view of Anderson is the correct one and that any other view would make a mockery of the presumption of innocence.

IV. Evidence

Section 457(3)(1)(*e*) would appear to give a justice a wide discretion regarding what may be admitted as evidence at an interim release hearing [41]

---

[39] *Supra* note 6.
[40] *Supra* note 37, at 36.
[41] Section 457.3(1)(*e*) reads:
In any proceeding under section 457, . . . (e) the justice may receive and base his decision upon evidence considered credible or trustworthy by him in the circumstance of each case.

and it has been held in a number of cases that a justice is not bound by the ordinary rules of evidence. In *R. v. Garrington,* [42] Mr. Justice O'Driscoll approved the following statement by Scollin. [43]

> It might well defeat the ends of justice to apply to the interim release hearing the relatively rigid rules of evidence which are considered necessary in determining guilt or innocence in the actual trial process. The result could be undue delay, inconvenience and expense.

In the *Garrington* case, two police officers were permitted to give hearsay testimony under oath. The admission of hearsay evidence was also approved in *Powers v. The Queen.* [44]

Although the rules of evidence are to be relaxed it was said by the Ontario Court of Appeal in *R. v. West* [45] that either actual evidence must be brought or else Counsel for both sides must agree as to the facts. It was said that a judge cannot consider facts stated by counsel but not agreed to by the other side. It was also said that both sides were to have an opportunity to cross-examine.

In *R. v. Julian* [46] although it was held that the accused probably would show for trial, Gillis admitted as evidence the opinions of an experienced police officer, based on his observations of the accused, to the effect that the accused would be unlikely to appear. Gillis apparently felt that the officer's experience qualified him as an expert in such matters. In *R. v. Smith,* however, when the Crown sought to have similar opinions of a police officer admitted Mr. Justice MacFarlane said: "I intend to disregard those opinions because they relate to matters which I must decide." [47]

It is submitted that the better approach to such evidence is that taken by MacFarlane in the *Smith* case. No matter how experienced an officer may be, it is still for the justice to decide what the factual evidence shows. Moreover, it can hardly be said that most police officers will be indifferent or unbiased at such a hearing.

IV. Duration of the Order

The general rule regarding an order of release, conditional release or detention is that the order lasts until the matter has been disposed of. This is subject to section 459(1) which provides for review by a judge after an accused has been detained for 90 days (if an indictable offence) or 30 days (if a summary conviction offence) without trial provided that the accused is not required to be detained "in respect of any other matter." It has been held that where the accused's parole has been cancelled or revoked because of the charge, that is an "other matter" within the meaning of the subsection so

---

[42] [1973] 1 Ont. 370, at 375 (High Ct. 1972).
[43] *Supra* note 4, at 148-49.
[44] *Supra* note 37.
[45] *Supra* note 24, at 19-20.
[46] *Supra* note 10.
[47] *Supra* note 13, at 292.

that it is not necessary to bring the accused before a judge after the 90 day period has expired. [48]

Because a release order is valid until trial it was held in *R. v. Sabean* [49] and in *Hetu v. The Queen* [50] that where an accused was released prior to a preliminary inquiry, the magistrate who presides at the preliminary inquiry has no jurisdiction to order committal where he decides that the accused must stand trial. Similarly, it was held in *R. v. Bellerose* [51] that where a detention order had been made, the magistrate presiding at a preliminary inquiry had no jurisdiction to grant a release with conditions when the preliminary inquiry was delayed because of the Crown's difficulty in producing a vital witness.

In *R. v. Lafontaine* [52] the accused was charged with non-capital murder and was ordered detained after a hearing under section 457.7. Following the preliminary inquiry, however, the accused was ordered to stand trial on the reduced charge of manslaughter. It was held that because the non-capital murder charge formed the basis for the detention order, the detention order was vacated when the accused no longer faced that charge and that the presiding magistrate should then have held a bail hearing under section 457.

At least a part of the basis for the decision in the *Lafontaine* case is that a person accused of non-capital murder can only be released or detained by a Superior Court Judge who has discretion under section 457.7 to order detention even if the Crown fails to show cause. The hearing for a person accused of manslaughter, however, is under section 457 and there is no discretion to order detention unless the Crown shows cause. It is submitted, however, that the reasoning of the *Lafontaine* case should extend to all cases where the accused is ordered to stand trial for a different offence, or a lesser number of offences, than he was originally charged with. The nature and seriousness of the offence is an important consideration at an interim release hearing and it cannot be said that had the accused faced different charges that the order would have been the same. The Crown, of course, would have a similar argument if the accused was ordered to stand trial for additional offences disclosed by the evidence.

V. Miscellaneous Cases

A. Unnecessary Arrest

Section 450(2) provides that a peace officer "shall not" arrest a person without a warrant for certain offences unless he has reasonable and probable

---

[48] R. v. Albino, 19 Can. Crim. (n.s.) 10 (Ont. County Ct. 1972).
[49] 19 Can. Crim. (n.s.) 18 (N.B. County Ct. 1972).
[50] 10 Can. Crim. Cas.2d 484 (Que. Q.B.).
[51] 9 Can. Crim. Cas.2d 70 (Alta. Sup. Ct. 1972).
[52] 13 Can. Crim. Cas. 316 (Ont. High Ct. 1973).

grounds to believe that the arrest is necessary in the public interest or to ensure attendance in court. In *R. v. Adams*[53] the accused resisted arrest on a charge of impaired driving and was charged with obstructing a peace officer in the execution of his duty contrary to section 118(*a*). The trial judge acquitted the accused on the grounds that, as section 450(2) applied and as the police officer did not have reasonable and probable grounds to believe that an arrest was necessary, the arrest was unlawful. The decision of the trial judge was reversed on appeal. The Court of Appeal applied subsection 450(3) which provides that where a peace officer makes an arrest which would be justified but for section 450(2) (in this case arresting a person found committing a criminal offence) he is to be deemed to be "acting lawfully and in the execution of his duty" for the purposes, inter alia, of "any proceedings" under the Criminal Code. Consequently, the accused's resistance to arrest was a criminal offence even though the arrest itself was unlawful. Although this may seem anomalous on first consideration it should be considered that section 450(2) applies to persons who, prior to the Bail Reform Act, would have been subject to arrest and that the discretion granted to police officers is not always an easy one to exercise. It is submitted that it is in the best interests of the peaceable enforcement of the law that persons whose arrest would otherwise be lawful be required to comply peacefully with an arrest and seek civil damages where the police have not complied with section 450(2). It is to be hoped, of course, that judges would take the circumstances of the arrest into consideration when passing sentence especially if it appears that the police have acted in a particularly officious and high-handed manner.

B. Failure to Bring the Accused Before a Justice

Section 454(1) provides that where an accused has been arrested and detained by the police he is to be brought before a justice as soon as possible and in any case within 24 hours unless no justice is available. In *Ex Parte Venlerberghe*[54] it was held that the failure to bring an accused person before a justice within the 24 hour period, where a justice was available, made the arrest unlawful. However, it was held that notwithstanding the illegality of the arrest the justice before whom the accused was eventually brought had jurisdiction to hold an interim release hearing and to adjourn the proceedings to give the prosecutor time to show cause why the accused should not be released.

C. Appearance Notices

An important feature of the new bail legislation is that it provides for the issuance of an "appearance notice" in lieu of arrest for more minor offences[55] and the police may release a person who has been arrested for

---

[53] 21 Can. Crim. (n.s.) 257 (Sask. 1972).
[54] 13 Can. Crim. Cas.2d 84 (B.C. Sup. Ct. 1973).
[55] At § 451.

these offences and issue an appearance notice rather than proceed by information and summons. [56] An appearance notice sets out the substance of the offence charged and when and where the accused is to appear to answer to the charge. [57] However, where an appearance notice is issued, section 455.1 requires that an information be laid as soon as practicable and in any case before the time set for appearance. Further, section 455.4 requires that an appearance notice be confirmed or cancelled by a justice of the peace after hearing the allegations (and witnesses if necessary) *ex parte.*

In *R. v. Tourangeau* [58] it was held that an appearance notice does not become binding unless and until it is confirmed by a justice of the peace as required by section 455.4. In that case a charge of failure to appear was dismissed where, although the information had been laid, the appearance notice was not confirmed until the day after the date set for appearance.

In *Re Chisholm and The Queen* [59] it was held that where an appearance notice had been issued, failure to lay an information within the time set for appearance made the appearance notice a nullity. However, it was also held that failure to lay the information in accordance with section 455.1 did not prevent the later laying of an information and the issuance of a summons in the usual manner. In that case, as the accused appeared voluntarily after the information had been laid, it was held that a summons was unnecessary and the court had jurisdiction to try the offence charged. The decision in the *Tourangeau* case is supported by decisions to the same effect in *Re Regina and Powers* [60] and *R. v. Halyk.* [61]

D. Bench Warrants

Section 456.1 sets out the grounds on which a justice may issue a bench warrant. As there is no jurisdiction to issue a bench warrant where the accused is already in custody a justice should, where an accused who is in custody cannot appear, adjourn the proceedings for not more than 8 clear days in accordance with section 465. In *R. v. Peters* [62] the accused had been remanded from time to time and was scheduled to appear on Nov. 1, 1972. The accused was ill and in hospital on that day and so was unable to appear. Rather than adjourn the proceedings the court took no action that day, but on the following day issued a bench warrant to retain jurisdiction. The B.C. Court of Appeal ruled that the bench warrant was a nullity as there was no jurisdiction to issue it when the accused was in custody. Further, the result of the court's action was that the accused was remanded in custody for more than 8 clear days and therefore the court

---

[56] At § 452(1).
[57] At § 453(3).
[58] 19 Can. Crim. (n.s.) 1 (B.C. Provincial Ct. 1972).
[59] 11 Can. Crim. Cas.2d 401 (B.C. Sup. Ct.).
[60] 10 Can. Crim. Cas. 395 (N.B.Q.B. 1973).
[61] 21 Can. Crim. (n.s.) 244 (Sask. Dist. Ct. 1972).
[62] [1973] 4 W.W.R. (n.s.) (B.C.), *reversing* [1973] 1 W.W.R. (n.s.) 568.

lost jurisdiction over the offence and the defect could not be cured by a later appearance of the accused before the court.

VI. Review

A. General

The decision of a justice re interim release can be reviewed on application to a County or District Court Judge or to a Superior Court Judge under section 457.5 where the accused is the applicant or under section 457.6 where the prosecutor is the applicant. It was held in *R. v. Garrington* [63] that an application to a Superior Court judge need not be made in the same county in which the accused is detained but may be made anywhere in the province.

A decision re interim release by a Superior Court Judge under section 557.7 may be reviewed by the Court of Appeal if the Chief Justice so directs. This right is provided for by section 608.1.

As a matter of procedure the applicant for review should, in addition to a supporting affidavit, file with the reviewing court the order of detention (or release) and "the record" including a copy of the information, the reasons for the original order, and a transcript of any viva voce evidence taken at the original hearing. [64]

B. Nature of the Review

It was held by the Ont. Court of Appeal in R. v. West [65] that a review pursuant to section 608.1 is in the nature of an ordinary appeal and that new evidence was admissible only with leave of the court on the usual grounds. The *West* case was followed in this respect by the N.B. Court of Appeal in *R. v. Smith.* [66]

There is a difference of judicial opinion as to the nature of a review pursuant to section 457.5 or 457.6 of the decision of a justice under section 457. It was said in *R. v. Thompson* [67] and in *R. v. Powers* [68] that a review was in the nature of a hearing de novo and that the reviewing judge could substitute his opinion for that of the justice. In the *Powers* case reliance was placed on the provisions for compelling the attendance of the accused at the review [69] and the provision for the admission on review of "such additional evidence or exhibits as may be tendered by the accused or the prosecutor." [70] Lerner, J. was of the opinion that these provisions were more contemplative of a hearing de novo than of an ordinary appeal. He

---

[63] *Supra* note 42.
[64] R. v. Powers, *supra* note 37. *See also* R. v. West, *supra* note 24.
[65] *Supra* note 24.
[66] *Supra* note 24.
[67] *Supra* note 6, at 76.
[68] *Supra* note 37, at 28-29.
[69] Sections 457.5(3) & (5) and 457.6(3) & (5).
[70] Sections 457.5(7)(c) and 457.6(8)(c).

noted however, that when it is the accused who has applied for review the onus of showing cause does not remain with the prosecutor but rests with the accused by virtue of section 457.5(7)(*c*). In other words, if the *Powers* case is correct a review at the request of the accused is like a hearing de novo except that the onus is reversed and accused must show that his detention, or that the conditions attached to his release, are not justified.

In contrast with the *Powers* and *Thompson* cases it was said in *R. v. Horvat* [71] that a review pursuant to section 457.5 was in the nature of an appeal and that the order of the justice shouldn't be changed unless the justice had erred in law or principle. In *R. v. O'Neill* [72] Mr. Justice Barry was of the opinion that a review was in the nature of an appeal and said that the issue in the particular case was "whether or not there was evidence upon which the Prov. Ct. Judge could reasonably make the order he did."

A possible third alternative appears to be suggested by Mr. Justice Berger in *Regina v. Hill.* [73] Berger states that the onus is on the applicant to show cause why the order below should be set aside. If such cause is shown then the reviewing judge may substitute his discretion for that of the justice. A misconception of the facts or an error in law by the justice are given as reasons which would justify setting aside the order of a justice. A change in circumstances is also mentioned as a ground for vacating an order of a justice. In mentioning changed circumstances Berger approved of the decision in *R. v. Orlovitch* [74] where it was held on review that while the justice had properly taken into consideration the fact that the accused already faced trial on a similar charge (drug trafficking), the fact that the accused had been acquitted of the first charge in the interim was an important consideration and the accused was released.

A reading of the review provisions does not clearly seem to support any of the views expressed in the above cases but it is submitted that a hearing by way of an ordinary appeal is certainly not contemplated. It is provided that a judge hearing an application "may consider" the transcript of any evidence heard by the justice, any exhibits filed in the proceedings below and any new evidence tendered by either side. [75] Moreover, it is provided that either party may apply for a second review after 30 days or sooner with leave of the judge who hears the previous application. [76] Those would be most unusual provisions if an ordinary appeal is contemplated. On the other hand, the fact that the onus of showing cause is placed on the applicant for review even where the applicant is the accused [77] seems inconsistant with a hearing de novo. Moreover, it is submitted that if either an

---

[71] *Supra* note 16, at 1-2.
[72] 21 Can. Crim. (n.s.) 107, at 110 (N.B.Q.B. 1973).
[73] [1973] 5 W.W.R. (n.s.) 382, at 383 (B.C. Sup. Ct.).
[74] 8 Can. Crim. Cas.2d 567 (B.C. Sup. Ct. 1972).
[75] Sections 457.5(7) and 457.6(8).
[76] Sections 457.5(8) and 457.6(9).
[77] Sections 457.4(7)(e) and 457.6(8)(e).

ordinary appeal or a hearing de novo was contemplated Parliament would have said so in plain language.

It is submitted that a careful reading of the review provisions suggest that a reviewing judge should consider all factors relevant to the decision below and any relevant new evidence and attempt to determine whether or not the order below should be "vacated". The fact that the onus is on the applicant suggests that the order of the justice is to be treated as prima facie correct but the provisions for reviewing all of the evidence as well as for admitting new evidence suggest that where the judge is satisfied that the order below was wrong or that new evidence or changed circumstances indicate that a different order should be made, he should make that order which he thinks should have been or should now be made. The fact that the onus is on the applicant for review would suggest that the order below should not be vacated where, on the facts, reasonable justices could differ. However it is submitted that the applicant need not go so far as to show that the justice misconstrued the facts or erred in law as suggested in *R. v. Hill* [78] but that it is sufficient that the reviewing judge is satisfied that the order below should have been different than it was and, if so satisfied, he should make the order which he feels should have been made.

[78] *Supra* note 73.