CANADA
PROVINCE OF NOVA SCOTIA
2001

CASE NUMBERS: 999688-96

IN THE PROVINCIAL COURT

HER MAJESTY THE QUEEN

VERSUS

PATRICK JOHN BEVIN

[Cite as: R. v. Bevin, 2001 NSPC 27]

DECISION

HEARD BEFORE: The Honourable Associate Chief Judge R. Brian Gibson, J.P.C.

PLACE HEARD: Dartmouth, Nova Scotia

DATE HEARD: August 31, 2001

DATE OF DECISION: October 16, 2001

COUNSEL: Cheryl Byard, for the Prosecution
Warren Zimmer, for the Defence

[1] On November 7, 2000 Patrick John Bevin was convicted on one count of Dangerous Driving Causing Death, contrary to S.249(4) of the **Criminal Code** and two counts of Dangerous Driving Causing Bodily Harm, contrary to S.249(3) of the **Criminal Code**. For these offences, Mr. Bevin was sentenced to terms of incarceration totaling three and one half years. I was the presiding judge on November 7, 2000 with respect to the imposition of those sentences.

[2] On May 1, 2001, the Crown made an application pursuant to the provisions of S.487.051(1)(b) of the **Criminal Code** seeking an order authorizing the taking of one or more bodily substances from Patrick John Bevin for the purpose of forensic DNA analysis. Hearing of the application was adjourned until August 31, 2001.

[3] This application involves consideration of two issues: 1) Do I have jurisdiction to grant the order requested? 2) If I have jurisdiction, should the order be made?

ANALYSIS

Jurisdictional Issue

[4] Consideration of this issue involves the term *functus officio.* The Supreme Court of Canada considered this term in the case of **Chandler v. Alberta Association of Architects**, (1989) 62 D.L.R. (4th), 577. Sopinka, J., writing for the majority of the Court, sets out the general statement of law respecting *functus officio* at p.595:

> "The general rule that a final decision of a court cannot be reopened derives from the decision of the English Court of Appeal in *Re St. Nazaire Co.* (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:

1. where there had been a slip in drawing it up, and,
2. where there was an error in expressing the manifest intention of the court"

[5] The Nova Scotia Court of Appeal in the case of **R. v. Simpson**, (1998) 172 N.S.R. (2d), 182, also considered the term *functus officio* in relation to criminal matters. Roscoe, J., writing for the Court, stated at p.188, "that a trial judge sitting without a jury is not *functus officio* until sentence has been imposed".

[6] To determine whether the rule, *functus officio*, applies to this application I must first determine whether consideration of the provisions of S.487.051(1)(b) must occur at the time of entering conviction and imposing sentence. If I determine that consideration of S.487.051(1)(b) must occur at that time, the rule, *functus officio*, applies to this application. If the rule *functus officio* applies, I must then determine whether the failure to make an order contemplated by the provisions of S.487.051(1)(b) at the time Mr. Bevin was sentenced falls within either of the two exceptions set out by Sopinka, J. in the **Chandler** case above.

[7] A determination of whether an application under S.487.051(1)(b) must be brought at the time of sentencing involves principles of statutory interpretation. S.487.051(1) reads as follows:

> **487.051 Order – (1) Subject to section 487.053, if a person is convicted, discharged under section 730 or, in the case of a young person, found guilty under the *Young Offenders Act*, of a designated offence, the court**
>
> (a) shall, subject to subsection (2), in the case of a primary designed offence, make an order in Form 5.03 authorizing the taking, from the person, for the purpose of forensic DNA analysis, of any number of samples of one or more bodily substances that is reasonably required for that purpose, by means of the investigative procedures described in subsection 487.06(1); or

> **(b) may, in the case of a secondary designated offence, make an order in form 5.04 authorizing the taking of such samples if the court is satisfied that it is in the best interests of the administration of justice to do so.**"

[8] As a general rule, statutory provisions which are penal or which affect the privacy or security interests of a person require strict interpretation. Reasonable ambiguities should be resolved in favor of the person subject to the penalty or intrusion. I conclude that, while not specifically penal, the provisions of S.487.051(1)(b) are, nevertheless, part of penal legislation; specifically the **Criminal Code**. The provisions of S.487.051(1)(b) involve the privacy and security interests of a person.

[9] In the course of further construing or interpreting the provisions of S.487.051(1)(b) and, in particular, the time when an application under that section must be brought, the words in S.487.051(1)(b) should be considered within their entire context and in their grammatical and ordinary sense, harmoniously within the scheme of the **Criminal Code**, the object of the **Criminal Code**, and the intention of Parliament.

[10] The provisions of S.487.051 of the **Criminal Code** are part of a statutory scheme found in the **DNA Identification Act** S.C. 1998, c.37, proclaimed in force June 30, 2000. The provisions of the **DNA Identification Act** amended the **Criminal Code** as well as other federal legislation. The **Criminal Code** amendments found in the **DNA Identification Act** set out three types of applications: *Prospective Applications* (S.487.051 of the **Criminal Code**); *Retrospective Applications* (S.487.052 of the **Criminal Code**); and *Retroactive Applications* (S.487.055 of the **Criminal Code**). All of these sections refer to applications and orders which are tied to the conviction or discharge of individuals in respect of certain

designated offences; either “primary designated offences” or “secondary designated offences” as set out in S.487.04.

[11] S.487.055, which deals with retroactive applications, requires that the individual, who is the subject of the DNA application, still be serving a sentence imposed in respect of a designated offence. The language used in S.487.055 contemplates entry of conviction and imposition of sentence prior to June 30, 2000 and that the sentence be unexpired as conditions precedent to a DNA application under this section. The provisions of S.487.055, through the words “had been convicted”, clearly employ the past tense regarding conviction and imposition of sentence but employ the present tense with respect to service of the sentence. The provisions of S.487.055 also provide for the manner in which the application is to be made, being an *ex parte* application by a peace officer. These provisions contemplate bringing the application at a time after imposition of sentence and conviction.

[12] On the other hand, the provisions of S.487.051 and 487.052 employ the present tense found in the words “if a person **is** convicted, discharged under s.730....” (emphasis added). S.487.051 applies to offenders, found guilty of designated offences committed after June 30, 2000, who are before the Court in relation to the conviction, sentencing or discharge process. S.487.052 applies to offenders who have committed designated offences prior to June 30, 2000, but who do not come before the Court in relation to the conviction, sentencing or discharge process until after June 30, 2000. Neither S.487.051 nor S.487.052 employ language which contemplates the previous imposition of sentence, as is the case with respect to applications brought under S.487.055. If such were the

intention of Parliament, language conveying that intention would have been employed, as was done in S.487.055.

[13] The provisions of S.487.051 and 487.052 are not unlike the provisions of SS.109 and 110 which deal with applications for firearms and weapons prohibition orders in respect of certain enumerated offences where a person “is convicted, or discharged...” (language found in SS. 109 and 110). It is well accepted that applications under SS. 109 and 110 are made only at the time of sentencing or alternatively at the time that a discharge, if any, is granted.

[14] I have considered that the provisions of S.487.051 and other sections dealing with DNA applications pursuant to the provisions of the **DNA Identification Act** are found in Part XV of the **Criminal Code** - Special Procedure and Powers and not Part XXIII, which deals with sentencing. It is noteworthy that SS.109 and 110 are found in Part III which deals with firearms and other weapons. I conclude that, for organizational purposes, the legislative drafters have placed the DNA provisions and the firearms prohibition provisions closer to other relevant or similar provisions in the **Criminal Code** rather than have them placed in Part XXIII. Such organizational decisions do not persuade me that the applications under these sections can be made at times other than as part of the discharge, conviction and sentencing process.

[15] I conclude, having employed the principles of statutory interpretation stated above, that consideration of an application for a DNA order pursuant to the provisions of S.487.051(1)(b) must occur at the time sentence is imposed or, if discharged, at the time the discharge is granted. If the application is not made in such a timely fashion, the rule

functus officio applies and the Court who has sentenced an offender or granted a discharge, is without jurisdiction to grant the order, unless it can be shown that there was a "slip in the drawing" up of the judgement or order or there was "an error in expressing the manifest intention of the court", being the two exceptions specified in the case of **Chandler v. Alberta Association of Architects** above.

[16] I turn now to a consideration of whether either of the two exceptions specified in the **Chandler** case apply. Crown counsel has referred me to the case of **R. v. Miraliakbari** [2001] N.J.No. 59, a decision of the Newfoundland Provincial Court. That case involved an application for a DNA order pursuant to S.487.051(1)(a). The application in the **Miraliakbari** case was brought before the Court a number of months after sentence was imposed and while the offender was still serving his sentence. That case, however, related to a "primary designated offence" as defined in S.487.04, while the application before me relates to a "secondary designated offence" as defined in S.487.04.

[17] S.487.051(1)(a) utilizes the words "shall...make an order" which suggests that it is the Court, in default of any application from the Crown, which must raise the issue and make the DNA order, subject to having first considered the factors set out in S.487.051(2). S.487.051(1)(b), on the other hand, utilizes the word "may...make an order", which suggests that the Court need not consider making a DNA order if no application is made by the Crown. The Court, however, "may" raise the issue and make an order in the absence of any Crown application, but it must first consider the factors set out in S.487.051(3). There is no evidence before me that the Court raised the issue of a DNA

order at the time sentence on Mr. Bevin was imposed, but failed to complete consideration of the matter.

[18] Hyslop, J. in paragraph 17 of the **Miraliakbari** decision, characterized the failure to consider making a S.487.051(1)(a) order at the time sentence was imposed as "an error of omission, in not considering the statutory framework as the court was required to do at the time of sentence". He further went on to state in paragraph 17 that "the granting of this application will act a (sic) perfection of the record and will allow the investigative authorities to compile a data base in accord with the statute". He concluded that the principle, *functus officio*, did not apply and proceeded to hear the application on its merits and grant the order. I infer from his decision that he found that one of the exceptions in the **Chandler** case above was applicable.

[19] I leave for another time whether the principle, *functus officio*, applies to an application brought pursuant to S.487.051(1)(a) after sentence has been imposed. My preliminary view is that the principle, *functus officio*, applies. S.487.051(1)(a), which requires a consideration of the factors set out in S.487.051(2), suggests that there is a need to exercise judicial discretion before making the DNA order and therefore a failure to make the order may be more than "a slip in drawing it up" or "an error in expressing the manifest intention of the court" as stated in the **Chandler** case above. Aside from this observation, the case of **R. v. Miraliakbari** has no relevance to this application before me.

[20] I conclude that neither of the exceptions set out in the **Chandler** case above apply

to this application before me. I must therefore conclude that I have no jurisdiction to either hear the application on its merits or grant the order sought by the Crown.

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R. Brian Gibson
Associate Chief Judge