IN THE PROVINCIAL COURT OF NOVA SCOTIA
[Cite as: R. v. Greener, 2003 NSPC 058]

Date: November 27, 2003
Case No:1378524
1378525
1378526
Registry: Dartmouth

BETWEEN:

HER MAJESTY THE QUEEN

v.

STEPHEN REGINALD GREENER

ORAL DECISION RESPECTING JURISDICTION TO VARY BAIL CONDITIONS

HEARD BEFORE: The Honourable D. William MacDonald, J.P.C.

PLACE HEARD: Dartmouth, Nova Scotia

DATE HEARD: November 27, 2003

DECISION: Orally on November 27, 2003

CHARGES: That he, on or about the 19th day of November, 2003, at, or near Lower Sackville, Nova Scotia, did commit an assault on Trych Herbert, contrary to Section 266 of the **Criminal Code**.

AND FURTHER AT THE SAME TIME AND PLACE AFORESAID, did by word of mouth knowingly utter a threat to Trych Herbert to cause bodily harm to Trych Herbert, contrary to Section 264.1(1)(a) of the **Criminal Code**.

AND FURTHER AT THE SAME TIME AND PLACE AFORESAID, did have in his possession a weapon to wit; a knife for a purpose dangerous to the public peace contrary to Section 88 of the **Criminal Code**.

COUNSEL: Ms. Cheryl Byard, for the Public Prosecution Service
Mr. Stephen Greener, for himself

Date: 20031127
Docket: 1378524, 1378525 and 1378526

1. This is an application by Stephen Reginald Greener who is seeking variations in his bail conditions. Mr. Greener is 19 years old and he is charged with three offences alleged to have occurred on November 19th, 2003. He is charged with assaulting his pregnant partner, who is 22 years of age, threatening to cause bodily harm to her, and possession of a knife for a purpose dangerous to the public peace. Mr. Greener was arrested, held overnight and arraigned before another Provincial Court Judge in Dartmouth who is assigned to do prisoner arraignments this month. The offence is alleged to have occurred in a geographic area from which criminal charges are normally heard in this courtroom. Once the arraignment of a prisoner has taken place, and release or detention issues are determined, the case goes to the courtroom where the matter would normally be heard. That is why this application is now before me.

2. The prosecutor elected to proceed summarily on these criminal charges so the trial is in the Provincial Court. When Mr. Greener was arraigned, he was represented by duty counsel. The role of duty counsel is to give advice respecting

arraignment issues and to speak to bail. Apparently the release conditions were agreed upon by the prosecutor and the defence, and the Judge made an Order accordingly. Mr. Greener was released on his own recognizance, with conditions. After that the role of duty counsel ended. Mr. Greener indicates he has applied for Legal Aid assistance, but it takes about five weeks to get an appointment with a lawyer in Dartmouth. Even if Mr. Greener is represented by Legal Aid counsel, they do not appear with their clients on applications to vary bail conditions, with rare exceptions. Thus, Mr. Greener came to the Court Administration Office himself to complete a short form, with assistance from the staff, and to have the matter scheduled for a hearing in Court. In Dartmouth, the Provincial Court Judges receive frequent applications of this kind, usually in cases of alleged domestic violence, and hearings are set within three days or so. The matters are simply added to existing dockets by administrative staff. A copy of the form is sent to the prosecutor to give notice so the prosecutor can prepare and can have the file in court.

3. Mr. Greener seeks removal of the conditions which prohibit him from having direct or indirect contact or communication with Ms. Trych Herbert, his partner, and removal of the condition which requires him to stay away from the residence which they had been sharing. Ms. Herbert's baby is due in about one

month. Mr. Greener wants to be able to seek counselling with Ms. Herbert, and to be available to assist her when the new baby arrives. Ms. Herbert is available to testify, and apparently supports Mr. Greener's application. The prosecutor has refused consent for me to hear the application, and submits that I have no jurisdiction to do so without that consent. The following reasons for refusing consent were given by the prosecutor on the record:

> The Crown is not prepared to consent for this application to be made in the Provincial Court. Mr. Greener was arrested by the R.C.M.P. on November 19th. He had the advantage of speaking to duty counsel in the cells. He came to court in the morning and appeared with Mr. Luke Craggs. He had the benefit of legal advice at the time. The information provided is that his partner was eight months pregnant and the Crown has serious concerns. He agreed to those conditions and there was a condition put in place to allow some contact; therefore, the Crown does not consent to hearing this application in the Provincial Court.

The permitted contact the prosecutor was referring to is contact through a lawyer, but it will be weeks before Mr. Greener has a Legal Aid lawyer, if his application for one is accepted. There was also provision for contact in accordance with a written separation agreement or court order for access to a child or children. As an aside, what constitutes a separation agreement is an interesting question. Would it be sufficient if the parties agreed to live together only if, for example, there is counselling taking place? Or, as another example, would it be a separation agreement if they agree to live together, but to separate if there is any physical

violence? I am not really in a position to decide that issue, and Mr. Greener should make no assumptions without getting advice on that point. Violating any conditions of his bail would be a criminal offence, but the reference to the separation agreement may be the same thing as saying they can be together if Ms. Herbert agrees in writing.

4. I do not know what happened between Mr. Greener and the lawyer who was serving as duty counsel and, of course, I should not know that. However, the problems a person faces in custody have been brought to my attention on other occasions. The arrested person will not have communicated with his or her partner since the incident and, therefore, will not know what contact the partner may wish after a few hours of reflection. It would be helpful for the court to hear from the alleged victim before making a "no contact" order, but that will usually mean the arrested person must be remanded for another night in jail while arrangements are made for the alleged victim to be interviewed and to testify at a show cause hearing. In other words, the no contact condition may be agreed upon in circumstances of uncertainty, and where the person in custody is under a form of duress. Of course, if the conditions are frequently lifted after a few days, that can become known and the real bail hearing may not take place at the time of release, but rather a few days later. I think that is a risk the court can control because of the

discretion it has, and because there must be a basis for making a change in bail conditions.

5. These are practical considerations, but what is the law? The prosecutor submits that the following words in clause 523(2)(c)(iii) of the **Criminal Code** apply in the present circumstances, namely:

> ... with the consent of the prosecutor and the accused ... the court, judge or justice before which or whom an accused is to be tried, may, on cause being shown, vacate any order previously made ...and make any other order ...

6. The prosecutor submits that the Provincial Court is the court before which the defendant is to be tried. On the other hand, no consent from the prosecutor is required if the provisions of paragraph 523(2)(a) of the **Criminal Code** apply, namely:

> ... the court, judge or justice before whom an accused is being tried, at any time ... may, on cause being shown, vacate any order previously made ... and make any other order ...

7. The first speaks of the procedure before the court where the defendant is to be tried. The second speaks of the procedure before the court where the defendant is being tried. Courts in Nova Scotia and in other jurisdictions in Canada have

considered this issue. In *R. v. Evans*, an unreported decision dated December 5, 2002, Judge Michael Sherar, in the Provincial Court of Nova Scotia, followed *R. v. Arkison*, reported at [1996] B.C.J. No. 2549, a decision of the British Columbia Provincial Court. Judge Sherar held:

> ... this court does not have jurisdiction in these circumstances unless I'm in trial, and I'm not assigned to this case. Once a trial happens, and the evidence is being heard, then I would have jurisdiction once again.

8. Judge Sherar commented to defence counsel, "... it would make a lot of sense to have the matter dealt with as you suggest ...", but he found the prosecution had the right to refuse consent. He noted there could be a bail review in the Supreme Court.

9. Sending self-represented defendants to the Supreme Court for a bail review is not realistic for many people. As I have already mentioned, Legal Aid lawyers generally do not appear in applications to change bail conditions. Self-represented defendants may be familiar with the Provincial Court where they have appeared, and they can get help with the necessary form from the Provincial Court at the window where fines are paid. The same defendant may find a Supreme Court application to be so daunting that it will not be made.

10. In paragraph 12 of the *Arkison* case *supra* which Judge Sherar followed, the court held:

> ... I hold that Section 523(2)(a) must be interpreted as meaning an application which is undertaken in the course of a trial. The plea being taken does not cause us to have embarked upon a trial. I am not, for example, seised(sic) of the matter at this point. Any judge of this court can proceed with the trial. I should think, at the least, that under 523(2)(a) enough would have to have happened to have caused a judge to be seised(sic) with the proceeding.

The Judge in the *Arkison* case made the following observations in paragraph 13, obviously based upon experience:

> Putting aside the technical legal argument, what I have here is a situation where spouses want to live together ... where there are persons who are bound and determined to be together, it is, at times, unrealistic to think that the court can order them not to be.

11. A person is innocent until proven guilty. After a plea of guilty, or a finding of guilty, a court may decide that the offence requires punishment that will deter the offender and others. Imprisonment may be imposed for that purpose, and to separate the offender from a potential victim. However, release conditions, while a charge is pending, are not for the purpose of punishment. They are to protect society, including an alleged victim. If the alleged victim is a mature person, who is capable of deciding what risk she or he is willing to accept, who is not under duress to support bail changes, and who does not fear for her or his safety, should a

criminal court order no contact or communication against the alleged victim's wishes? If bail conditions interfere with a relationship that two mature adults wish to have with each other, and if the procedure for changing those conditions is unduly complex for a self-represented defendant, or expensive for one who is paying a lawyer, the bail order will be setting the defendant up for another criminal charge. That is human nature. These considerations were obviously of concern to Associate Chief Judge Gibson when he decided *R. v. Smith* (2003), 214 N.S.R. (2d) 213, a Nova Scotia Provincial Court decision. Judge Gibson referred to, "... generally valid concerns raised by counsel for the accused." However, he concluded that the weight of authorities favoured an interpretation of Section 523 which required prosecution consent for a bail variation even where the charge is one which the Provincial Court has absolute jurisdiction to hear, or because there was an election to the Provincial Court, and even if a not guilty plea has been entered. Judge Gibson referred to *R. v. Hardiman*, (2003), 211 N.S.R. (2d) 358 (N.S.C.A.). In that case, the Nova Scotia Court of Appeal upheld Justice Cacchione's decision that Ms. Hardiman was not "to be tried" in the Supreme Court at the time of her application even though she was charged with an offence which must be tried in the Supreme Court. However, in that case, the question of when a trial begins for the purpose of interpreting Section 523 was not an issue. At the time of her application before Justice Cacchione, a Judge of the Nova Scotia

Supreme Court, Ms. Hardiman was scheduled to have a preliminary inquiry in the Provincial Court. She had not been committed for trial in the Supreme Court. In paragraph 11 of the Court of Appeal decision in *Hardiman,* the court said:

> There is no dispute that Ms. Hardiman was not "being tried" at the time of her application to vary the conditions and it is therefore not necessary to address the authorities concerned with defining exactly when an accused is "being tried" for the purposes of s. 523.

Judge Gibson, in the *Smith* case, said he had previously considered that the trial began when a plea of not guilty was entered.

12. When a trial begins may differ for different provisions of the **Criminal Code**. There is no specific definition. It depends on the purpose of the provisions.

13. A judge is seized with a trial when evidence is heard. A defendant is in jeopardy when a plea has been entered. Bail conditions determined by a court apply from the time they are made until the evidence is heard, if there is a need for evidence, a verdict is rendered, and the sentence is imposed. Throughout this process, there is a need for a court to manage its docket, to ensure a timely conclusion, and to ensure the defendant's right, "... not to be denied reasonable bail without just cause," as provided in section 11(e) of the **Canadian Charter of**

Rights and Freedoms, is honoured. The reasonableness of bail conditions may depend, in part, on the period of time during which they may apply. Bail conditions, and certainly detention, should be a consideration when trial dates are scheduled.

14. Some guidance, as to when a trial begins, can be found in the words which explain the choice of courts to which a person is entitled when charged with most indictable offences. Subsection 536(2) sets out the words of explanation used in most jurisdictions in Canada:

> You have the option to elect to be tried by a provincial court judge without a jury and without having had a preliminary inquiry; or you may elect to have a preliminary inquiry and to be tried by a judge without jury; or you may elect to have a preliminary inquiry and to be tried by a court composed of a judge and jury.

15. If, for example, the election is to a higher court, there is no further reading of the charge, and no plea is entered, until there is a committal for trial. After the committal, the person goes to the higher court, the indictment is read, and a plea is taken.

16. I conclude that the place where the person is “to be tried”, is the place where that person elects trial and to which there has been a committal for trial. Once in

the court, the person is “being tried” when being arraigned, when entering a plea, and when going through all other stages of the trial until the matter is concluded.

17. For these reasons, it is my opinion that the process of being tried in the Provincial Court, as contemplated by Section 523 of the **Criminal Code**, begins upon arraignment in the Provincial Court on a summary conviction charge, or on a charge within the absolute jurisdiction of the Provincial Court, and upon election when the election is to have a trial in the Provincial Court. A case is not “being tried” in the Provincial Court, or in any court, before the accused elects where to have the trial, or before there is a committal in cases where there is to be a preliminary inquiry.

18. In these situations, the ultimate trial scheduling is not in the hands of the Provincial Court. Likewise, in the Supreme Court, the ultimate scheduling of a criminal trial is not in the hands of that court until there is an arraignment in that court.

19. I would narrowly construe the words applying to the cases “to be tried” in a court, within the meaning of section 523. These words, in section 523, apply to cases where bail has been set, where the accused has elected trial in a higher court,

and where there has been a committal for trial. In those cases, the court where the case is "to be tried" has been chosen, and there has been a committal for trial so it is also known that the chosen court will try the matter. I would say the case is "being tried" as soon as an arraignment takes place. Therefore, the only time where the prosecutor's consent is required is the time between committal after a preliminary inquiry and arraignment in the higher court.

20. In the past, the time between committal and arraignment in the higher court could take weeks or months, depending on the circuit and the timing of terms of the court. The trend is to have more local judges and more frequent arraignments, so the provisions in section 523(2)(c)(iii) may be of diminishing importance.

21. As I have said, once a person is arraigned in the court which can receive the plea, that court has the obligation to deal with all aspects of that case on its docket.

22. My conclusion is also based upon discomfort with a process whereby a prosecutor should give reasons for exercising his or her discretion not to consent to a hearing respecting bail variation.

23. In the *Smith* case, Judge Gibson said a prosecutor should give reasons for refusing consent. However, this introduces an element that complicates the process unduly. What if the prosecutor's reasons are inadequate? Is it subject to judicial review? Should the same deference be shown to the exercise of discretion by a prosecutor as a Court of Appeal may show toward a trial Judge? Should a court be called upon to determine whether there has been a proper or improper exercise of discretion by a prosecutor, or would it be better to focus on the merits? The **Criminal Code** permits a variation on cause being shown. Should that not be the issue? A court, judge or justice is not bound to proceed with an application to vary bail conditions under Section 523. The permissive word "may" operates in this respect. If an applicant is coming back frequently or frivolously, or both, the court can quickly dismiss the application without putting the prosecutor to the effort of calling evidence or making arguments repeatedly.

24. The discretion not to hear an application should be exercised by a court if an alleged victim has testified about traumatic circumstances at an earlier bail hearing. The court before which the defendant is being tried can be relied upon to consider such factors.

25. A final reason for my conclusion is that if the court, judge or justice before whom an accused is being tried means only a judge who is hearing evidence, and who is seized with the case, that judge may be put in the position of dealing with information to determine bail issues that could render it impossible to be impartial at the trial. If another judge in the same court can deal with bail questions, then the Judge hearing the evidence on its merits can do so without anyone having a justified concern about impartiality.

26. For all these reasons, I find I have jurisdiction to vary the terms of the recognizance on application by the defendant whether or not the prosecutor consents. I will now hear the submissions and any evidence on this application so I can decide it upon its merits.