IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Kell, 2004 NSPC 54

Date: 20040826
Docket: 1442724, 1442725, 1445648
1445649, 1445488
Registry: Antigonish

HER MAJESTY THE QUEEN

v.

GERALD CHARLES KELL

DECISION RESPECTING JURISDICTION TO VARY RELEASE CONDITIONS

Judge:	The Honourable Judge John D. Embree
Date Heard:	August 26, 2004
Place Heard:	Antigonish, Nova Scotia
Date of Oral Decision:	August 26, 2004
Date of Written Decision:	October 27, 2004
Charge(s):	On or about the 8th day of May, A.D., 2004, at, or near Antigonish, in the County of Antigonish, Province of Nova Scotia, did while bound by a Probation Order made by a Judge of the Provincial Court in and for the Province of Nova Scotia on the 20th day of November 2003, wilfully fail to comply with such order, to wit: keep the peace and be of good behaviour, contrary to Section 733(1) of the Criminal Code.

AND FURTHERMORE at the aforsaid [sic] time and place, did being at large on his Undertaking given to a Justice and being bound to comply with a condition of that Undertaking directed by the Justice, to wit: You are not to possess or consume alcoholic beverages or illicit drugs, did unlawfully fail to comply with that condition, contrary to Section 145(3) of the Criminal Code.

On or about the 19th day of July, A.D. 2004, at, or near Beaver Brook Trailer Court, Antigonish, in the County of Antigonish, Province of Nova Scotia, did while bound by a Probation Order made by a Judge of the Provincial Court in and for the Province of Nova Scotia on the 23rd day of November, 2003, without reasonable excuse fail to comply with such order, to wit: keep the peace and be of good behaviour, contrary to Section 733.1 of the Criminal Code.

AND FURTHERMORE, at the same time and place, did being at large on his Undertaking given to a Justice and being bound to comply with a condition of that Undertaking directed by the Justice, to wit: not to possess or consume alcohol beverages or illicit drugs, did unlawfully fail to comply with that condition, contrary to Section 145(3) of the Criminal Code.

On or about the 19th day of July, A.D. 2004, at, or near Beaver Brook Trailer Court, Antigonish, in the County of Antigonish, Province of Nova Scotia, did wilfully obstruct Constable R.F. PARRIS a member of the Royal Canadian Mounted Police, engaged in the lawful arrest of Gerald Charles KELL, contrary to Section 129(a) of the Criminal Code.

Counsel: Allen Murray, for the Crown
Lawrence O'Neil, for the Defendant

Embree, P.C.J. (Orally):

[1] Gerald Charles Kell is before the Court in relation to five summary conviction offences. A show cause hearing was held in relation to all of those matters on July 20, 2004. At the conclusion of that hearing, Mr. Kell was granted judicial interim release and was released on an undertaking with a series of conditions. On August 9, 2004, Mr. Kell was back before the Court and entered not guilty pleas, and trial has been set for all matters to April 6, 2005. Mr. Kell is now making an application seeking to vary a condition of his release contained in the July 20th undertaking. The Crown contends that this Court has no jurisdiction to deal with this application in the absence of consent by the Crown. The Crown has stated that it is not providing that consent.

[2] The applicable provisions of the *Criminal Code* are in section 523(2). Those provisions state:

> Notwithstanding subsections (1) and (1.1),
>
> (a) the court, judge or justice before whom an accused is being tried, at any time,
>
> (b) the justice, on completion of the preliminary inquiry in relation to an offence for which an accused is ordered to stand trial, other than an offence listed in section 469, or
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> (c) with the consent of the prosecutor and the accused, or where the accused or the prosecutor applies to vacate an order that would otherwise apply pursuant to subsection (1.1), without such consent, at any time
>
> (i) where the accused is charged with an offence other than an offence listed in section 469, the justice by whom an order was made under this Part or any other justice,

> (ii) where the accused is charged with an offence listed in section 469, a judge of or a judge presiding in a superior court of criminal jurisdiction for the province, or
> (iii) 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 under this Part for the interim release or detention of the accused and make any other order provided for in this Part for the detention or release of the accused until his trial is completed that the court, judge or justice considers to be warranted.

[3] The issue before me is whether the circumstances of Mr. Kell place him within the provisions of section 523(2)(a) as a person who "is being tried", or whether Mr. Kell's circumstances place him within the provisions of 523(2)(c)(iii). It is the Crown's contention that section 523(2)(c)(iii) would be applicable, as I understand the Crown's position, and that, consequently, the consent of the prosecutor is necessary for the Court to entertain and deal with the application.

[4] A number of authorities have been referred to me by counsel. Those were: the Supreme Court of Nova Scotia judgment of Mr. Justice Cacchione in *The Queen v. Charlotte Lilly Hardiman,* 2002 NSSC 208, which is also reported at 208 N.S.R (2d) 24; the judgment of the Nova Scotia Court of Appeal in the same matter, namely *The Queen v. Hardiman* , 2003 NSCA 17, also reported at 211 N.S.R. (2d) 358; the decision of Associate Chief Judge Gibson in *The Queen v. Debra Jean Smith*, 2003 NSPC 8, also reported at 214 N.S.R. (2d) 213; the decision of Judge William

MacDonald in *The Queen v. Stephen Reginald Greener,* 2003 NSPC 58, also reported at 220 N.S.R. (2d) 9. Both *Smith* and *Greener* refer to an unreported decision of Judge Michael Shearer in *The Queen v. Evans*, a decision dated December 5, 2002. *The Queen v. McCreery* (1996), 110 C.C.C. (3d) 561, a decision of the British Columbia Supreme Court; *The Queen v. Badgerow,* [2000] O.J. No. 5442, a decision of the Ontario Superior Court of Justice; *The Queen v. Nickerson,* [2002] N.S.J. 356, a decision of the Nova Scotia Supreme Court. Other judgments I have considered are: *The Queen v. Sood*, [1992] O.J. No. 2842, a decision of the Ontario Court of Justice General Division; *The Queen v. Patterson* (1985), 19 C.C.C. (3d) 149, a decision of the Alberta Court of Appeal; *The Queen v. Arkison*, [1996] B.C.J. No. 2549, a decision of the British Columbia Provincial Court; *The Queen v. Holt,* [1999] S.J. No. 673, a decision of the Saskatchewan Provincial Court; *The Queen v. Micheaud,* [2000] S.J. No. 846, a judgment of the Saskatchewan Provincial Court; and *The Queen v. Barrow*, [1987] 2 S.C.R. 694, a judgment of the Supreme Court of Canada.

[5] *Barrow* and the Nova Scotia Court of Appeal judgment in *Hardiman* are clearly judgments binding on this Court. However, I do not consider that *Hardiman* conclusively deals with the issue that's before me. The circumstances in *Hardiman*

were different than Mr. Kell's, and the Court of Appeal in dealing with *Hardiman* at the conclusion of paragraph 11, says, and I quote:

> 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.

Therefore, the Court of Appeal in *Hardiman* cannot be taken as giving directions or passing judgment on when an accused is "being tried" for the purposes of section 523.

[6] The meaning of the word "trial", and when a trial commences, and when a defendant is being tried, can be different, depending on the particular provisions of the *Criminal Code* involved and the purpose of that provision.

[7] I refer to *The Queen v. Barrow* which dealt with the issue of whether the accused was present for all of his trial when certain issues involving jurors being excused were dealt with outside the accused's hearing. It was, therefore, necessary for the Court, when dealing with section 577 of the *Criminal Code,* to consider when the trial of the accused had begun. The majority judgment in *Barrow* cites the earlier

Supreme Court judgment in *Basarabas and Spek v. The Queen*, [1982] 2 S.C.R. 730 and states in paragraph 12 that, the Court in *Basarabas and Spek*:

> held unanimously that (i) the time of commencement of a jury trial will vary according to the circumstances and the language of the section of the Criminal Code being applied;

[8] The majority judgment of Chief Justice Dickson then went on to say at paragraphs 13, 14, and part of 15, the following, and I quote:

> In the course of the *Basarabas* judgment, however, reference was made to the section of the *Code* in issue in the present appeal. After noting that the time of commencement of a jury trial will vary according to the circumstances and the language of the section of the *Criminal Code* being applied, the Court continued at p. 740:
>
> > Thus, the word "trial" in s. 577(1) which assures the accused the right to be present "during the whole of his trial" will be liberally construed to afford the accused the right to be present during the selection of the jury. In like manner, the word "trial" in s. 566 which denies the prosecutor the right to direct a juror to stand by on the trial of an indictment for the publication of a defamatory libel will be interpreted to embrace the proceedings preceding the empanelling of the jury. In other sections "trial" may have a different connotation depending on the section of the *Code* being applied.

[9] That's the end of the quotation from *Basarabas*, and Chief Justice Dickson continues:

> The reason for varying starting points is that different sections of the *Code* protect different interests. Section 573 allows the judge to remove a juror who for some reason is unable to continue, but the removal of a juror is a very serious matter. An accused has a right to be tried by 12 jurors (ss. 560(5) and 572(1)) and every effort must be made to avoid a jury of less than 12 members. If the jury has heard no evidence, as in *Basarabas*, then a juror can be replaced and s. 573 should not be used. "Trial" there refers to the heart of the trial, the presentation of evidence before the trier of fact. Section 577, however, protects different interests and in my opinion should be given an expansive reading. The words "whole of the trial" mean just that, the whole of the trial.
>
> In my view, the examination of prospective jurors by the trial judge, relating in part to their impartiality and following arraignment and plea, formed part of the trial for the purposes of s. 577.

[10] I would point out that comity of judgments is to be preferred within any particular level of court and is certainly to be sought, if at all possible. However, here, it would appear that the *Smith and Greener* judgments, both decisions of the Provincial Court of Nova Scotia, are already in conflict with regard to the meaning of when a defendant is being tried for the purposes of section 523(2). Certainly in *Smith*, Associate Chief Judge Gibson viewed the matter of one, there, being governed by section 523(2)(c), which required Crown consent for him to have jurisdiction. Judge MacDonald in *Greener*, accepted that he did have jurisdiction and that the prosecutor's consent was not required for him to have that jurisdiction.

[11] With the utmost respect for any contrary views, it's my conclusion that the words "is being tried" in section 523(2)(a) should not be given an overly restrictive interpretation. For example, "is being tried" should be taken as referring to more than just that portion of a trial where evidence is presented or where a Judge engages in some conduct or process which seizes that Judge with jurisdiction. Such processes may be at the heart of the trial, as those words were used in the quotation above in *Barrow*, but they should not necessarily be considered to be all of the trial.

[12] All of the judicial interim release provisions should be read together and their respective purposes and objectives analyzed. Having attempted to do that, it's my conclusion that I do have jurisdiction to deal with this application in the absence of Crown consent. To that extent, I agree with, and prefer, the conclusion expressed by Judge MacDonald in *Greener*. However, with respect, I cannot agree with my colleague, Judge MacDonald, as to the stage of proceedings at which I would acquire that jurisdiction under section 523(2)(a).

[13] In paragraphs 16 and 17 of *Greener*, Judge MacDonald says, and I quote:

> 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.
>
> 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 on the 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.

[14] With respect, I can't agree that "is being tried" extends quite as far as Judge MacDonald suggests. The key point, in my respectful view, as to when a trial commences and when a defendant "is being tried" for the purposes of interpreting section 523(2), is when a plea has been entered. If the matter is an indictable offence and the accused elects to be tried by a Provincial Court Judge and then enters a plea, that person "is being tried" from then on in the Provincial Court. Similarly, with a summary conviction offence, or an offence over which Provincial Court otherwise has absolute jurisdiction, once a not guilty plea, or any plea, has been entered, the provisions of section 523(2)(a) apply, if necessary, because then the defendant "is being tried".

[15] I consider that the entry of plea is a logical and easily definable position in the process for it to be concluded, for the purposes of 523(2), that a defendant or accused

"is being tried". Once a plea is entered, the defendant is in jeopardy in relation to the matter. The entry of a plea gives the Provincial Court the jurisdiction and ability to deal with a series of issues related to the trial and the trial process.

[16] It is my conclusion that Mr. Kell's situation is not one governed by section 523(2)(c)(iii). I do not consider it necessary for me to describe what circumstances might fall within that provision.

[17] In the matters before me here, the Crown has proceeded summarily, pleas of not guilty have been entered, and, in my view, section 523(2)(a) applies. The defendant "is being tried" for the purposes of that section. I will set a further date to hear any evidence and submissions on the particular variation that is being sought here.

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John D. Embree
Judge of the Provincial Court