IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. MacLean, 2002 NSSC 283

Date: 20021231
Docket: CRSAT 2702
Registry: Antigonish, N.S.

Between:

Her Majesty the Queen

v.

Roderick James MacLean

Judge:	The Honourable Justice Donald M. Hall
Heard:	November 28, 2002, in Antigonish, Nova Scotia. Decision Rendered Orally November 28, 2002.
Written Reasons:	December 31, 2002.
Counsel:	Allen Murray, for the Crown Lawrence O'Neil, Esq., for the defence

By the Court:

[1] Following the dismissal of a charge against the accused that he "between the 16th day of May A.D. 2000 and the 1st day of October A.D. 2001, at, or near Dunmore, in the County of Antigonish, Province of Nova Scotia, did without lawful excuse disobey the lawful order made by Honourable Douglas L. MacLellan, Justice of the Supreme Court of Nova Scotia on May 11, 2000 contrary to section 127 of the **Criminal Code of Canada**", I stated that I would file written reasons for my rulings. Those reasons follow.

[2] During the course of the trial the court was called upon to rule on three separate issues:

1. Whether an accused who had elected trial by judge and jury could, with the consent of the Crown, re-elect to trial by judge alone after he had entered a not guilty plea and been put in the charge of the jury;

2. Whether the enforcement procedures and the power to punish for contempt under the **Civil Procedure Rules** of this Province or s. 31 of the **Matrimonial Property Act** are “a punishment or other mode of proceeding expressly provided by law” so as to take disobedience of orders made under the authority of the **Matrimonial Property Act** out of the operation of s. 127;

3. Whether frequent uninvited visits to the matrimonial property by the accused spouse constituted disobedience of an order for exclusive possession under s. 11 of the **Matrimonial Property Act**.

[3] After the accused and his common law spouse, Katherine O'Hara, separated, Ms. O'Hara obtained an order for exclusive possession of the "matrimonial home" under s. 11 of the **Matrimonial Property Act** of this Province. The order was dated May 11, 2000, and provided, among other things:

> 1. THAT Katherine Jean O'Hara (MacLean) shall have interim exclusive possession of the matrimonial home located at Dunmore, Antigonish County, Nova Scotia commencing at 8:00 P.M. on Friday, May 12, 2000 and continuing until further order of this Court;
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> 2. THAT Roderick MacLean may remove his personal belongings and his bed and living room chair from the matrimonial home;
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> 3. THAT all sheriffs, constables and peace officers shall do all such acts as may be necessary to enforce this Order and for such purposes they, and each of them, are hereby given full power and authority to enter upon any lands and premises whatsoever to enforce the terms of this order.

[4] On May 12, 2000, the accused moved out of the property and Ms. O'Hara took possession. Between October 8, 2000 and September 17, 2001, the accused arrived uninvited at the residence ten or eleven times. On each visit he requested a specific tool or other item of personal property. On two of the visits Ms. O'Hara was not at home but one of their daughters was.

[5] Ms. O'Hara had become upset by these unwanted visits and complained to the R.C.M.P. On October 4, 2001, an information was sworn charging the

accused with disobeying a court order contrary to s. 127 of the **Criminal Code**. Section 127 provides.

> 127. (1) Every one who, without lawful excuse, disobeys a lawful order made by a court of justice or by a person or body of persons authorized by any Act to make or give the order, other than an order for the payment of money, is, unless a punishment or other mode of proceeding is expressly provided by law, guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

[6] In Provincial Court ;the accused elected trial by a judge with a jury and waived the holding of a preliminary inquiry. Subsequently his trial was scheduled to begin at Antigonish on November 28, 2002. On November 25, 2002, however, the jury for his trial was selected following his plea of not guilty and he was placed in the charge of the jury.

[7] Late in the afternoon of the day before the trial was to begin the accused's counsel informed the court by letter that the accused wished to re-elect to be tried by judge alone and that the Crown would consent if such were permitted by law at this stage.

[8] The next morning the court assembled without the jury being present. After confirming the position of the parties, I informed them that I would permit the re-election as I was of the view that there was authority to do so and that it would be appropriate in the circumstances of this case.

[9] The jury was then brought in and the accused made his re-election to be tried by judge alone. It was felt that the re-election should take place in the

presence of the jury so that they would better understand why the case was being taken from them. The jury was then discharged.

[10] Mr. O'Neil, counsel for the accused, then moved that the indictment be quashed on the ground that there is "another mode of proceeding expressly provided by law" viz. rules 52 and 55 of the **Nova Scotia Civil Procedure Rules.** After hearing the submissions of counsel I stated that I would hear the evidence and rule on the motion after the evidence had been presented.

[11] After the Crown had presented its evidence and closed, Mr. O'Neil, before electing whether to call evidence, moved for a dismissal on the ground that there was no case to answer. After hearing submissions of counsel I granted the defence motion and acquitted the accused. At the time I gave very cursory reasons for my rulings but advised that I would provide written reasons.

[12] The difficulty with respect to the re-election issue arose as a result of the fact that the accused had been "put in the charge of the jury". Some authorities have held that once an accused is put in the charge of the jury, the jury is seized with that case. That being so, the question arises as to whether the judge may take the case from the jury and permit the accused to re-elect.

[13] There Appears to be no express statutory limitation as to the time when an accused may re-elect his/her mode of trial where the prosecutor consents. Section 561(1)(c) of the **Criminal Code** states**:**

> 561. (1) An accused who elects or is deemed to have elected a mode of trial other than trial by a provincial court judge may re-elect
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> . . .
>
> (c) on or after the fifteenth day following the completion of the preliminary inquiry, any mode of trial with the written consent of the prosecutor.

[14] The question remains however, as to whether the re-election procedure continues to be available to the accused after the trial has begun. It seems to be beyond dispute that the trial begins at the point where the accused has entered a not guilty plea, the jury empanelled and the accused placed in the charge of the jury. See **R. v. Basarabas** [1982] 2 S.C.R. 730; 2 C.C.C.(3d) 257**; R. v. Richardson** (1987) 39 C.C.C.(3d) 262; **R. v. Socobasin** (1996) 110 C.C.C.(3d) 535, 154 N.S.R.(2d) 118.

[15] It is noted, however, that under s. 644(1.1) Parliament has drawn a distinction where the jury has not yet begun to hear evidence with respect to the ability of a judge to select another juror to replace a juror who was unable to continue to act. This provision, of course, has no application here, but it does recognize that different considerations may apply in the case of the beginning of the trial and beginning to hear evidence.

[16] Furthermore, the Supreme Court of Canada held in **Korpaney v. Canada (Attorney General),** [1982] 1 S.C.R. 41, 65 C.C.C.(2d) 65 that an accused person may waive the procedural requirements which were enacted for his benefit. Clearly the legislative and constitutional provisions entitling an accused to trial by jury are procedural requirements for the benefit of an accused. Here the accused sought to waive that requirement and the Crown was prepared to consent As pointed out, however, by Hart, J.A., of the Nova Scotia Court of Appeal in **R. v. Thompson** (1987) 40 C.C.C.(3d) 365, at page 368, "Unfortunately, jurisdiction to try a criminal case cannot be acquired by consent."

[17] In **Criminal Pleadings and Practice in Canada**, 2nd. edition, by Mr. Justice E.G. Ewaschuk, the learned author obliquely notes in paragraph 8:3040 that in **R. v. Retzer** (1978) 43 C.C.C.(2d) 483, the Ontario Court of Appeal held that an accused may, with the consent of the prosecutor, re-elect prior to evidence being heard. At paragraph 8:3080, however, he referred to an unreported decision of the British Columbia Court of Appeal, **R. v. Smith**, June 30, 1993, which held that once an accused is placed in the charge of a jury, the jury is seized of the trial and an accused is not entitled to re-elect even with the consent of the Crown.

[18] It seems apparent that any objection to an accused re-electing after the trial has begun is not statute based but is based on common law principles of procedure. That being the case, as was done in **R. v. Rowbotham** [1994] 2 S.C.R. 463, 90 C.C.C.(3d) 449, if necessary or desirable, the common law procedure may be modified. In that case the Supreme Court of Canada held that the former procedure respecting directed verdicts should be radically changed. The traditional position had been that where the trial judge had concluded that there was no evidence for the jury to consider, because the jury was seized with the case, the trial judge would instruct the jury to retire and return with a verdict of not guilty. Lamer, C.J., in delivering the unanimous judgment of the Court said at page 472 (S.C.R.):

> Requiring the trial judge, the counsel, the court staff, the accused, and everyone else involved to wait for the jury to retire, elect a foreperson, discuss the case amongst themselves, and return with a predetermined verdict results in unnecessary delay and needless formality in the administration of justice. This unnecessary delay and needless formality flies in the face of the legal maxim “Ilex neminem cogit ad vana seu inutilia” - “the law constrains no man to do what which is vain or futile” . . .

And at page 474:

> There is no statutory bar to reforming the traditional procedure for directed verdicts of acquittal. The original justification for the traditional procedure is not relevant to the proposed procedural reform. There are considerable policy justifications for reforming the procedure. I therefore conclude that the traditional procedure for directed verdicts of acquittal should be reformed.

[19] If in fact the common law procedure would prohibit an accused from re-electing his/her mode of trial after the jury had become seized with the case, it is my opinion, based on the reasoning of the Supreme Court of Canada in **Rowbotham**, that the procedure ought to be modified to permit a re-election at any point before the jury has begun to hear evidence where all parties are consenting.

[20] For those reasons the Court permitted the re-election.

[21] The second issue raises a very important point - does the power to punish for contempt provided by the Nova Scotia **Civil Procedure Rules** amount to "a punishment or other mode of proceeding expressly provided by law"?

[22] In **R. v. Clement** [1981] 2 S.C.R. 468, the Supreme Court of Canada held that the general inherent power of the court to conduct its affairs and to punish for contempt does not amount to a "mode of proceeding expressly provided by law" under then s. 116(1). The Court held that the meaning to be attributed to the words "by law" is "by statute law" which would include federal and provincial statutes and regulations made thereunder as well as rules of court.

[23] **Clement** involved an alleged breach of an order in a matrimonial dispute. One of the issues considered by the Court was whether the following

Manitoba Queens Bench Rules might provide a penalty or other mode of proceeding:

> 483 A judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment, or by committal.
>
> 485 No writ of attachment shall be issued without the leave of the court, to be applied for on notice to the person against whom the attachment is to be issued.
>
> 492 Any corporation or individual disobeying a judgment, or guilty of any other contempt of court, may be fined. Such fine may be in lieu of, or in addition to, punishment by attachment, committal, or sequestration.

[24] In this regard, Estey, J., writing for the Court, said at page 5:

> Rules 483 and 485 do not provide a penalty or punishment, nor do they provide, at least not expressly, for a mode of proceeding where a lawful order made by a court of justice has been disobeyed in the sense of contempt. While rule 492 provides that a fine may be imposed for contempt of court, in lieu of or in addition to, punishment by attachment, committal or sequestration, the rule does not, however provide the express penalty. It cannot be taken as a comprehensive provision dealing with contempt of court such as is obviously contemplated by the exception to s. 116(1). The rule, while providing a brief and imprecise recognition of the continuing inherent power of the Court of Queen's Bench to enforce its own process, cannot, by itself, be said to furnish the legal foundation for a proceeding for contempt of court. It is more appropriately analogous to the preservation of inherent contempt of court powers which was achieved by s. 8 of the Criminal Code and which was discussed by the Court in Vaillancourt v. The Queen, supra. Without that common law substratum, these rules alone cannot be a fulfilment of the exceptional requirement of s. 116(1) that there be "some penalty or punishment or other mode of proceeding . . . expressly provided by law, . . ."

[25] And at page 7:

> By this line of reasoning I would construe the subsection as being available as the basis for a charge for disobedience of a lawful court order whenever statute law (including regulation) does not expressly provide a punishment or penalty or

> other mode of proceeding, and not otherwise. Here, for reasons above stated, no other section of the Criminal Code, supra, and no Rules of Court have so expressly provided. The common law is precluded as a source of law wherein such penalty, punishment or proceeding can be "expressly" provided. In all these circumstances, therefore, s. 116 may be invoked by the Attorney General for the enforcement of the lawful orders of the Court of Queen's Bench of Manitoba be those orders criminal or civil in nature. This conclusion is not at all shaken by the possibility that other proceedings might have been launched by reason of s. 8 of the Criminal Code, supra, preserving as it does the inherent power of the court, or whether action might be taken through the inherent powers of the court to enforce its own processes. The availability of other avenues of process in no way operates to remove s. 116 from the arsenal of criminal remedy available for use by the executive branch of government in the enforcement of the laws of the land, unless those avenues fall within the exception, as properly construed.

[26] The Nova Scotia Court of Appeal considered the comments of Estey, J., in the context of s. 127 in **R. v. Dawson** (1995) 143 N.S.R.(2d) 1. In that case the accused was charged under s. 127 with disobeying an *ex parte* access order made by the Family Court under the **Family Maintenance Act**. Jones, J.A., referred to s. 42(1) of the Act which provides for the remedial action that may be taken where a person fails to comply with a condition of the other, including the power to:

> (c) issue a warrant for imprisonment of such person for such time not to exceed three months as the judge thinks fit unless, where the order is for the payment of a sum or sums of money, such sum or sums and the costs and charges attending the commitment and of conveying such person to jail are sooner paid.

[27] The Court unaminously held that that provision amounted to a punishment or other mode of proceeding expressly provided by law. At paragraph 27, Jones, J.A., stated:

> Based on the decision in Clement, in my view s. 42(1) of the Family Maintenance Act clearly provided a punishment or other mode of proceeding expressly provided by law for the enforcement of custody orders made under that Act. That is the procedure which the Legislature deemed appropriate having regard to the overall purpose of the Family Maintenance Act. The fact that the section may be more restrictive or of limited application does not remove it from the clear exception provided in s. 127(1) of the Code. With respect the learned trial judge was in error in concluding otherwise. I would allow Mr. Dawson's appeal on the first count in the indictment and set aside the conviction and sentence on the charge under s. 127(1) of the Code.

[28] Rule 52.02 of the Nova Scotia **Civil Procedure Rules states:**

> 52.02. (1) An order for the giving of possession of real property or the delivery of any personal property may be enforced by any one or more of the following orders:
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> (a) a recovery order as provided by rule 48.13;
>
> (b) a contempt order as provided by Rule 55.
>
> (2) An order for the recovery of possession of real property, or for the return of any personal property, or in lieu thereof the recovery of the assessed value thereof, may be enforced by a recovery order as provided by rule 48.13.

[29] Rule 55 provides in part:

> 55.01. The power of the court to punish for contempt of court may be exercised by a contempt order, which may be granted by the court, upon notice under rule 55.02 or upon order under rule 55.03.
>
> . . .

55.05(1) The court may make a contempt order in Form 55.05A which may order that,

(a) a person cited for contempt be imprisoned as ordered or until further order;

(b) when a person cited for contempt fails to comply with any term or condition in an order, he be imprisoned as ordered therein;

(c) a sheriff enter upon and take possession of any property of a person cited for contempt and receive and collect the rents, profits or income thereof until the person shall clear his contempt by complying with the terms of the order;

(d) direct a person cited for contempt to pay a fine, give security for good behaviour, pay such costs and expenses or comply with such other order as the court may grant under rule 55.09.

. . .

55.09. Nothing in rule 55 shall limit the powers of the court to make an order requiring a person found guilty of contempt under this rule to:

(a) pay a fine;

(b) give security for his good behaviour;

(c) pay such costs and expenses as it thinks just;

> (d) when he is a party to a proceeding,
>
> (i) have his pleading, or any part thereof, struck out;
>
> (ii) have the proceeding stayed or dismissed, or have judgment entered against him;
>
> (iii) prohibit him from introducing into evidence any designated document, thing or testimony;

[30] In my view the potential dispositions under Rule 55 are almost identical to and include those under s. 42(1) of the **Family Maintenance Act**. In **Clement**, Estey, J., was of the view that Rule 492 of the Manitoba Rules was not a sufficiently comprehensive provision to bring it within the exception in s. 127, as he considered it to be analagous to the inherent contempt of court powers of the Courts. It is also apparent that he regarded s. 127 as a device for "the enforcement of the laws of the land." The Nova Scotia Rule is much more comprehensive and detailed than the Manitoba Rules under consideration in **Clement.** As such they provide a comprehensive means of enforcement of orders made by the court. Accordingly, I concluded that the provisions of Rules 52 and 55 constituted another mode of proceeding expressly provided by law, thus excluding the operation of s. 127.

[31] It is to be noted that s. 31 of the **Matrimonial Property Act** also provides for enforcement of orders for possession under the **Act**. It states:

> 31 It is the duty of a peace officer to enforce a court order made, or an arbitration award filed with the court, pursuant to this Act as it relates to peaceable possession of residential premises where
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> (a) the peace officer's assistance is requested by a person named in the order; and
>
> (b) the peace officer is satisfied as to the existence of the court order or court record of the arbitration award.

[32] By virtue of this provision if a party fails to obey an order for possession made by a court under the Act, the other party may require a peace officer or officers to enforce the order. To my mind this also may constitute another mode of proceeding so as to exclude the operation of s. 127.

[33] As to the third issue, that is, whether the several uninvited visits of the accused to Ms. O'Hara's home constituted disobedience of the order for exclusive possession, the evidence relied upon by the Crown to establish the charge was that of the accused's attendances at the property. The Crown contended that the visits amounted to an interference with Ms. O'Hara's peacable enjoyment and possession of the property which constituted a breach of the order.

[34] The question is, exactly what did the order for exclusive possession require the accused to do? At the time of the granting of the order the accused was

residing in the home alone, Ms. O'Hara and the children having moved out some months before. Thus, he was in *de facto* exclusive possession of the home at that time. The order simply stated that Ms. O'Hara was to have "interim exclusive possession of the matrimonial home commencing at 8:00 p.m. on May 12, 2000 and continuing until further order of this Court".

[35] I interpret this provision of the order to mean that, as between the accused and Ms. O'Hara, Ms. O'Hara was to have exclusive possession of the property. As a result, the accused was obliged to give up possession of the property and permit Ms. O'Hara to take possession of it and to continue to maintain possession to his exclusion until otherwise ordered by the Court. In the context of this proceeding possession means the right to occupy the premises. In practical terms the accused was required to move out of the home and to permit Ms. O'Hara to move in by 8:00 p.m. on May 12, 2000 and not to reoccupy the property himself.

[36] The accused moved out on the designated date and Ms. O'Hara was permitted to move in on the same date without interference from him. He has not since moved back into the home nor attempted to do so. The accused's subsequent visits to the property were always of short duration, three to five minutes. Generally he went to the home seeking some specific

items. On the one or two occasions when Ms. O'Hara asked him to leave, he left.

[37] In my opinion these acts by the accused were not done in an effort to exercise possession of the property. Although the visits may have been unwanted and annoying to Ms. O'Hara, they did not amount to a breach of the order for exclusive possession as framed.

[38] Accordingly, I concluded that the Crown had not met the test enunciated by the Supreme Court of Canada in **United States v. Shepherd** [1977] 2 S.C.R. 1067, 30 C.C.C.(2d) 424, that unless there is evidence upon which a reasonable jury properly instructed could return a verdict of guilty, the judge should withdraw the case from the jury and enter a dismissal. I therefore found that there was no case for the accused to answer and granted the defence motion for a dismissal and discharged the accused.

[39] It is interesting to note that the order refers to the "matrimonial home", although the accused and Ms. O'Hara were never married. Despite that fact, it seems that the Court's jurisdiction to make the order was not questioned at the time the order was granted nor in the course of this proceeding. Presumably that was because of the decision of the Nova Scotia Court of Appeal in **Walsh v. Bono** (2000) 183 N.S.R.(2d) 74, declaring that the

Matrimonial Property Act was unconstitutional since it discriminated against unmarried couples. After this trial was concluded, however, the Supreme Court of Canada has reversed the decision of the Nova Scotia Court of Appeal, effectively ruling that the **Matrimonial Property Act** applies only to lawfully married couples. See **Nova Scotia Attorney General v. Bono,** 2002 SCC 83.

Donald M. Hall, J.