Docket: CAC 163860
Date: 20001221

NOVA SCOTIA COURT OF APPEAL

[Cite as: R. v. Brown, 2000 NSCA 147]

Roscoe, Chipman and Oland, JJ.A.

BETWEEN:

BERNARD JOHN BROWN

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

Counsel:	Appellant appeared in person Peter Rosinski for the Respondent
Appeal Heard:	November 28, 2000
Judgment Delivered:	December 21, 2000

THE COURT: The appeal is allowed and the convictions are set aside as per reasons for judgment of Roscoe, J.A.; Chipman and Oland, JJ.A., concurring.

ROSCOE, J.A.:

[1] This is an appeal from convictions entered by Judge Alan Tufts on three charges of disobeying a court order contrary to s. 127(1) of the **Criminal Code**.

[2] On February 21, 2000 the appellant was released from prison on day parole with conditions, one of which was that he have no contact with Katherine Richards, his former girlfriend. On February 28th, he was sent to reside at a half-way house, with the condition respecting Ms. Richards to continue. The chronology of relevant events thereafter is as follows:

March 6th - The appellant was charged with assaulting Ms. Richards on March 5th.

The appellant's parole was suspended.

The appellant appeared in Provincial Court, entered a not guilty plea and the matter was adjourned for trial to March15th.

The appellant was remanded into custody by consent.

Although there does not appear to be a written order or warrant, the back of the Information is endorsed with a notation to this effect.

March 15th - The appellant appeared before Judge Claudine MacDonald for trial, but the matter did not proceed. It was adjourned to the following day and at the suggestion of the Crown, Judge MacDonald said to the appellant:

> There will be ... an order ... under s. 515(12). There will be an Order in the Remand, the Order, there will be an Order directing that you abstain from communicating with Katherine Richards . . .

A "Warrant of Remand and Committal Pending Trial" was signed by a Justice of the Peace. The remand was "until the accused is delivered ... [to the Court] ... on the 16th day of March, 2000". It was said to be on consent, and it included a notation of the s. 515(12) order.

March 16th - The assault trial was held. The appellant was convicted by Judge MacDonald and remanded pending sentence until April 12, 2000. A "Warrant of Remand ... pending sentence (s.523(1)(b)(ii))" was signed by the Justice of the Peace. This Warrant does not contain any reference to the s.

515(12) order with respect to Ms. Richards.

April 12th - The appellant was sentenced by Judge MacDonald to 15 months incarceration, to be followed by two years probation.

May 4th - The appellant was charged with four counts of disobeying a court order by communicating with Ms. Richards between March 14 and April 12, 2000, contrary to s. 127(1) of the **Criminal Code**.

[3] Although he is representing himself on this appeal, at the trial before Judge Tufts, the appellant was represented by counsel. At the trial, the Crown tendered the transcript of the hearing before Judge MacDonald on March 15th and the Warrant dated March 15, 2000. There was no mention of the Warrant dated March 16th. Ms. Richards testified that she received three letters and one telephone message from the appellant. The letters and a tape from her answering machine were tendered as exhibits. The evidence and cross-examination all focused on whether the appellant was the author of the letters and the speaker of the telephone message. Defence counsel also suggested in argument that the Crown had not proven that the letters were sent after the date of the no contact order, and that his client had not been given a copy of

the order or been advised of the consequences of breaching it. The appellant did not testify.

[4] In his decision, the trial judge indicated that he was satisfied that the order made on March 15th was a valid order and that the appellant was aware of the order. He entered an acquittal on the count respecting the first letter because he was not satisfied that the letter was sent after the date of the order. With respect to the other counts, he was satisfied beyond a reasonable doubt that the appellant was the author of the communications and that they had been received by Ms. Richards.

[5] The appellant states his grounds of appeal as follows:

> 1. The Learned Trial Judge failed to give the Appellant the benefit of the doubt with regard to the phone call when there was clear evidence that the Appellant could not have made the call on the date and time when alleged.
>
> 2. Was there in fact an Order of the Court prohibiting the Appellant from having contact with the Complainant after March 16, 2000?

[6] Since the appeal should be allowed on the basis of the second ground, it is not necessary to deal with the first issue.

[7] Generally, s. 515 of the **Criminal Code** provides the grounds and jurisdiction for either releasing or detaining an accused person from the time of first appearance. Detention ordered pursuant to s. 515(5) is to continue "until he is dealt with according to law". Subsection (12) is as follows:

> (12) A justice who orders that an accused be detained in custody under this section may include in the order a direction that the accused abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the order, except in accordance with such conditions specified in the order as the justice considers necessary.

[8] Other relevant provisions are s. 520(1) and s. 521(1) which provide for applications to vary a s. 515(12) order *before* the trial of the charge, and s.523(2) which allows an application to vacate a detention order made pursuant to s. 515 and to substitute another order. None of these sections was utilized in this case. The remand order made on March 16th, after the appellant was found guilty, was on its face made "pending sentence" pursuant to s. 523(1)(b)(ii). However, that section appears to apply to situations where the accused has been released pending trial and then remanded after having been found guilty.

[9] Since the amendment to the **Criminal Code** authorizing the imposition

of a non-communication order while an accused person who has been detained, is relatively new, having been proclaimed in force on February 2, 1995, there are few reported cases in which it has been considered. No decisions on the point in issue in this case were located.

[10] The appellant says that the order made on March 15, 2000, pursuant to s. 515(12) expired on the following day when the remand to which it was appended expired. Crown counsel on appeal argues that the order made on March 15th did not expire or otherwise cease to be effective until the completion of the sentencing hearing on April 12, 2000.

[11] In my opinion, the appellant's position is supported by several factors:

1. Section 515(12) states that "... a justice who orders that a person is to be detained under this section, may include in the order...". The no contact order is therefore not a stand-alone order that continues indefinitely. It is included as a condition of the detention order made under the authority of s. 515.
2. Detention orders made pursuant to s.515 are according to s. 515(5) to

continue "... until dealt with according to law ...". The no contact order therefore was also to continue until the appellant was "dealt with". He was next dealt with when he appeared on March 16th, was tried, convicted and remanded pending sentence, without conditions.

3. The no contact order remained in effect while the appellant was detained under s. 515. After he was found guilty, the appellant's remand was no longer pursuant to s. 515.

4. The March 15th order containing the no contact order said it was "until March 16th".

5. The verbal order of Judge MacDonald was that the s. 515(12) order would be "in the remand". There was no suggestion made at that time that the no contact condition was intended to continue after the expiration of the remand.

[12] In this case, the initial remand pursuant to s. 515 was probably not necessary since the appellant's day parole had been revoked and he would have been in custody pending trial in any event.

[13] In my opinion, the order made by Judge MacDonald pursuant to

s.515(12) expired and ceased to have effect on March 16th when the remand in which it was included ceased to have effect. Although the remand that replaced it after the appellant was found guilty should have been made pursuant to s. 523(2), not s.523(1)(b)(ii), its apparent lack of validity cannot revive the conditions of the previous remand which had by then lapsed.

[14] Therefore the convictions for breaching the order must be set aside. It is not necessary to consider the first ground of appeal. Nor is it necessary to determine whether s. 127(1) is the proper charging section for a breach of a s. 515(12) order, given that s. 145(3) is a more specific section and s. 127(1) is limited to situations where no "other mode of proceeding is expressly provided by law". See **R. v. Gaudreault** (1995), 105 C.C.C. (3d) 270 (Q.C.A.).

[15] I would allow the appeal and set aside the convictions.

Roscoe, J.A.

Concurred in:

Chipman, J.A.

Oland, J.A.