SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Garnier*, 2017 NSSC 102

Date: 20170413
Docket: CRH No. 454738
Registry: Halifax

Between:

Her Majesty the Queen

v.

Christopher Garnier

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	April 4 and 5, 2017, in Halifax, Nova Scotia
Counsel:	Christine Driscoll and Carla Ball, for the Crown Joel Pink, Q.C. and Ronald Pizzo for the Defence

By the Court:

Introduction

[1] Mr. Garnier was arrested on September 16, 2015 and charged with the second-degree murder (s. 235 Criminal Code), and interference with human remains (s. 182 Criminal Code), of Catherine Campbell, on or about September 11, 2015. On December 20, 2016, Justice Gabriel of this court released Mr. Garnier on a Recognizance. That Recognizance, also bound three sureties in the amount of $100,000. The sureties are his father, Vince Garnier; his stepmother, Angela Garnier; and his biological mother, Kim Edmunds. The conditions thereof included:

> (c) Report every Wednesday and Friday in person to Halifax Regional Police at 1975 Gottingen Street, Halifax, Nova Scotia, between 9:30 a.m. and 4:30 p.m. and in the company of one of sureties;…
>
> (i) You are to reside at Suite 401, 50 Waterfront Drive Bedford Nova Scotia, or at 117 Millville Highway, Millville, Nova Scotia, with your mother, Kim Edmunds, unless permission to reside elsewhere is obtained from the court;…
>
> (k) House arrest – you shall confine yourself at all times to your place of residence except:
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> 1-When at regularly scheduled employment…
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> 2-When dealing with a medical emergency…
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> 3-You are entitled to one, two hour period each week on Saturday in the presence of one of your sureties to attend to personal needs;
>
> 4-When attending psychological counselling…
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> 5-When travelling between Vince and Angela Garnier's place of residence located at Suite 401, 50 Waterfront Drive Bedford Nova Scotia, and Kim Edmunds place of residence located at 117 Millville Highway, Millville, Nova Scotia, and travelling to and from those residences by a direct route in the company of one of your sureties;
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> 6-When attending court…
>
> 7-When attending a scheduled appointment with your lawyer…
>
> (l) To prove compliance with house-arrest condition by presenting yourself at the entrance to your residence should a peace officer attend there to check compliance.

[2] While at his mother's residence at 117 Millville Highway, on February 19, 2017, Mr. Garnier was arrested in relation to his allegedly not being present inside his mother's residence, and presenting himself at the entrance to the residence when Constable Steven Campbell, of the Cape Breton Regional Police, was present and knocked on two doors to the home between 1:20 a.m. and 1:36 a.m. on February 18, 2017.

[3] In addition to the bail revocation process being triggered by the Crown, Mr. Garnier was also charged with three (indictably elected) counts of breach of s. 145(3) Criminal Code, which information is concurrently being processed in Provincial Court.

[4] The Crown seeks to continue the detention of Mr. Garnier, by having the court revoke the recognizance of December 20, 2016. The Crown argues that Mr. Garnier is,

> in breach of s. 524(4)(a) by virtue of him breaching clauses of his recognizance, namely:
>
> i. Having visited his grandparents in North Sydney in the company of his surety -mother on two occasions (December 30, 2016 and February 18, 2017) on the purported basis of the exception to his house arrest condition in his recognizance allowing a two hour Saturday outing "to attend to personal needs";
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> ii. On February 18, 2017 at 1:20 a.m., having not been present in his mother's residence at 117 Millville Highway, Millville, Nova Scotia/not presenting himself in response to a compliance check at that address/failing to keep the peace and be of good behaviour;
>
> and is in breach of s. 524(4)(b) by virtue of there being reasonable grounds to believe that he has committed an indictable offence, namely:
>
> i. The mere fact that the three count s. 145(3) information has been sworn alleging the same factual circumstances, and breaches of the same clauses of his recognizance listed in ii) above;

ii. Irrespective of the swearing of the three count s. 145(3) information, there are reasonable grounds to believe that he committed what would amount to the offences alleged in the three count s. 145(3) information.

[5] Mr. Garnier argues that the Crown has failed to demonstrate that he is in breach of either s. 524(4)(a) or (b), and even if he were, seeks his continued release, whether under the original conditions in the recognizance or some modification thereof.

[6] After a very careful review of the law and evidence, I conclude that the Crown has not satisfied me that Mr. Garnier contravened the conditions of his Recognizance. Therefore, he is ordered released from custody on charges in this court, and his Recognizance is again operative as it was immediately prior to his arrest.

The applicable law

[7] Mr. Garnier was arrested without warrant on February 19, 2017. Counsel agree that his arrest engaged s. 524(3)(a) and consequently s. 524(4) Criminal Code. As I see it, his recognizance has been suspended, pending the outcome of this bail revocation hearing. Counsel also agree that the court should consider a two-stage process: [1]

1. The Crown must present evidence sufficient to permit me to find either that:
    a. Mr. Garnier has contravened his recognizance; or
    b. There are reasonable grounds to believe that Mr. Garnier has committed an indictable offence after the recognizance was entered into.

2. If I am so satisfied, Mr. Garnier must then satisfy the court, "why his detention in custody is not justified within the meaning of subsection s. 515(10)", in light of any new evidence arising after he entered into

[1] I agree with and adopt the relevant comments of the Newfoundland Court of Appeal in *R. v. Parsons*, [1997] NJ No.337(CA), per Green J.A. in chambers, at para. 21

> the recognizance, which "entails some consideration of the propriety of the original release decision, but only in the sense of whether the initial decision remains tenable in light of recent events. In other words, bail revocation is not meant to be a mechanism by which to launch a collateral attack on the original order…" [2]

This decision deals with stage one only – the so-called "cancellation stage".

(i) The mere fact of a valid information having been laid is not determinative of the s. 524(4)(b) "finding"

[8] The Crown argues that it has demonstrated "that there are reasonable grounds to believe that the accused has committed an indictable offence after… recognizance was issued…", merely by virtue of a police officer having sworn the three (s. 145(3)) count information herein, that he has reasonable grounds, and does believe that, Mr. Garnier violated the conditions of his recognizance as a result of the same circumstances that underlie the Crown's application to revoke his bail. Respectfully, as a matter of law, I disagree.

[9] I acknowledge that Justice Trotter, in *The Law of Bail in Canada*, at para. 11.4(c) expressly supports the Crown's position. At page 11-10, he states:

> A few issues arise in this context. First, the operative term "finds" fails to articulate the level of proof that is required before the summons or release form should be cancelled. But, realistically, the standard is only meaningful with respect to (a). When the reason for the revocation is the allegation of a new offence, proof of the new charges will satisfy this criterion. When it is alleged that the accused has breached or was about to breach a form of release, the judge or justice is called upon to reach a determination on this issue.

[10] He also states in footnote 34:

> … In both subsections, paragraphs (a) and (b) create slightly different standards. With respect to non-criminal breaches, the justice or judge must find that there has been an actual breach. When the trigger for the s. 524 application is the alleged commission of a further indictable offence, the justice or judge need only find that there are reasonable grounds. When the sworn information is before the justice, this aspect of the procedure will be satisfied.

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[2] Justice Gary Trotter, *The Law of Bail in Canada*, Third Edition, Toronto: Carswell, 2010 (updated loose-leaf)

[11] However, I must respectfully point out that, he does not provide any authority or express any basis for why his interpretation is preferable. Why it is appropriate as a matter of statutory interpretation and preferable based on underlying policy considerations to take away the fact-finding aspect from a judge, and obligate the judge to defer to the presumptively "regular" swearing by a peace officer that there are reasonable grounds to believe the offence has been committed as alleged?

[12] I accept that, for non-s. 469 offences for example, s. 515(6) creates a reverse onus "that the accused be detained in custody until the accused is dealt with according to law, *if the accused is charged (a) with an indictable offence*, other than an offence listed in s. 469, (i) that is alleged to have been *committed while at large after being released* in respect of another indictable offence pursuant to the provisions of this part or s. 679 or 680,…". That is, merely being charged with another indictable offence while at large on bail, can create a reverse onus, in relation to bail for the new charges. [3] However, in light of the statutory language: "where… the judge finds… that there are reasonable grounds to believe that the accused has committed an indictable offence after any… recognizance was issued…"; the "finding" function has been assigned to the judge. If Parliament thought otherwise, it could have used wording to the effect that paralleled s. 515(6), which has the effect of the making the mere existence of a new information charging an indictable offence while on bail, determinative of the cancellation stage in a bail hearing on that new information, leaving the defendant to show cause why bail should be granted in relation to the new information.

[13] Although the issue was not put to him directly, Justice Green in *Parsons*, (at paras. 10, 30-33) opted to himself make that "finding" after hearing evidence from the investigating officers, even though in that case, he was aware that, as in this case, new informations charging the relevant offences were before the Provincial Court.

[14] Section 524(4) involves the process of Mr. Garnier being "taken before a judge". Therefore, the words "and the judge finds", can only mean that the judge himself/herself has independently assessed and determined whether "the accused

[3] In this case, parallel proceedings in Supreme Court (s.524) and Provincial Court (s.515) are taking place – which is appropriate – *R. v. Yarema* [1991] O.J. No. 712 (C.A.) at paras. 16 – 18.

has contravened… his… recognizance" ***or*** "there are reasonable grounds to believe that the accused has committed an indictable offence after any… recognizance was issued or given to him or entered into by him".

[15] I conclude that where, as is the case here, there is a newly charged indictable offence, to rely on s. 524(4)(b) the Crown must demonstrate to the satisfaction of the judge hearing the bail revocation, that there are "reasonable grounds to believe" an indictable criminal offence has been committed, and cannot merely rely on the fact of the laying of a new information, in which a police officer has sworn/affirmed his or her subjective belief, and that *they* believe there are reasonable grounds to believe an offence has been committed. Thus, the laying of the new charge of an indictable criminal offence by itself would be neutral evidence in a hearing under s. 524(4)(b). Whether a charge has been laid or not, a judge must assess whether there are "reasonable grounds to believe that the accused has committed an indictable offence" after the recognizance was issued.

[16] This reasoning is even more compelling where, as is the case here, the s. 145(3) indictable offence charged is entirely based on an alleged breach of the substantive clauses of the recognizance – i.e. there is not a freestanding independent criminal offence alleged. Whether examined under s. 524(4)(a) or (b), the process that leads to the judge's "finding" in such cases, at its core involves identical considerations.

[17] In summary, I agree on its face, the language of s. 524(4) would appear to permit the Crown to rely upon either para. 524(4)(a) or (b).

[18] It is significant however that there are different thresholds that will trigger a judge's "finding" pursuant to para. (a) and (b).

(ii) Which threshold is appropriate to use in this case if I conclude that the thresholds of both s. 524(4) (a) and (b) are satisfied?

[19] The jurisprudence is clear that the threshold, "reasonable grounds to believe that the accused has committed" an indictable offence, is different and lower than that of a finding "that the accused has contravened… his… recognizance", which I say requires a finding on a balance of probabilities. [4]

[4] In *R. v. Storrey*, [1990] 1 S.C.R. 241, the court stated that the reasonable grounds threshold is even lower than a *prima facie* case threshold.

[20] This brings me firstly to observe that the language in s. 524(4) (a) and (b) is directed at different circumstances: para. (a) appears concerned with circumstances which would amount to a breach of the provisions of a recognizance- e.g. failure to abide by a curfew condition; whereas para. (b) is expressly concerned with the commission of "an indictable offence" which often, but not always, exists independently of the recognizance conditions. [5]

[21] As to which threshold I should use if the Crown has established a basis under both 524(4) (a) and (b), generally either will be sufficient. However, as a matter of statutory interpretation and fairness to a defendant whose liberty is at risk, in such situations as exist here, I conclude that the higher standard in s. 524(4)(a), "on a balance of probabilities" that is intended for proof of breach of the provisions of a recognizance, is the appropriate standard for me to choose in Mr. Garnier's case. [6]

[22] This higher standard conforms better with the constitutional jurisprudence regarding s. 11(e) Charter of Rights, which insists that persons charged with offences are "not to be denied reasonable bail without just cause". At this stage, Mr. Garnier is still presumed innocent. It also better conforms with the likely intention evidenced by the language chosen by Parliament in s. 524(4)(a), in contrast to (4)(b).

[23] Without having entered upon an exacting exercise of statutory interpretation, but based on my long association with the criminal law, I conclude that Parliament considered that proof of breach of a condition of the recognizance itself was largely a factual determination that generally does not involve criminality *per se*,

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[5] I appreciate that most recognizances have a condition that an accused shall "keep the peace and be of good behaviour", which after trial usually will be found to necessarily have been violated, if there is proof of the commission of an offence (summary conviction or indictable)- e.g. *R. v. Stone*, (1985) 22 CCC (3d) 249 (NLSC) – whether such offence was separately charged or not. Nevertheless, in my opinion, unless there is evidence to support a finding, that it is more likely than not that a freestanding independent *indictable* offence has been committed, (even without such offence being charged against the accused by the laying of an information) any potential finding that the accused failed to keep the peace and be of good behavior, should only be considered as satisfied under s. 524(4)(a), as a finding that "the accused has contravened … his… recognizance", and not as satisfying s. 524(4)(b). A breach of a substantive condition of a recognizance should not be the basis upon which it is claimed that there is a s. 145(3) offence and therefore a failure "to keep the peace and be of good behaviour" under s. 524(4)(b).

[6] The gravamen of the prohibited/omitted conduct here, whether reviewed under s. 524(4) (a) or (b), is that Mr. Garnier did not comply with the substantive conditions of his recognizance. When the indictable offence alleged (here s. 145(3)) is in reality limited to breach(es) of the substantive conditions of the recognizance, I conclude that Parliament intended s. 524(4)(a) to apply. I conclude that s. 524(4)(b), only applies to freestanding independent indictable offences.

and lends itself to proof on a balance of probabilities; in contrast, at trial, proof of a criminal offence is required beyond a reasonable doubt. That standard is clearly unreasonably onerous for a pre-trial allegation that an accused has committed a subsequent indictable offence, when the primary concern is whether the individual thereby continues to remain a proper candidate for bail. While Parliament could have used the proof of the commission of an indictable offence "on a balance of probabilities standard" in s. 524(4)(b), that was also likely seen to be a too onerous standard, and one which might undesirably provoke a trial-like process. The "reasonable grounds to believe" threshold is consistent with the standard required for arrest without a warrant (s. 495), and while a lower standard, the court still must consider whether the individual should be detained, as opposed to released on the same or similar bail conditions. That is to say, the lower threshold, by itself, is not unfairly prejudicial to an accused, because it is not determinative, and thereby s. 524(4)(b) remains faithful to the constitutional jurisprudence and particularly s. 11(e) of the Charter of Rights. However, in unusual cases such as this, where the indictable offence alleged under s. 524(4)(b) is essentially breach of the substantive conditions of the recognizance, and not a freestanding independent criminal offence, such that both the threshold in s. 524(4)(a) and (b) are potentially applicable, the Crown's reliance on s. 524(4)(b) then does also become unacceptably unfair- see e.g. Judge Gorman's comments in *R. v. LTW*, [2004] NJ No. 260 (Prov. Ct), at para 1.

[24] To reiterate, I find that the statutory language suggests that when the gravamen of the basis for the Crown's claim for bail revocation under s. 524(4), is the breach of the substantive conditions of bail, the court must rely upon s. 524(4)(a), and not 524(4)(b), even where a new charge of breach of recognizance (s. 145(3)) has been laid, if that alleged offence is entirely based upon a substantive breach of the conditions of bail.

(iii) Consideration of the essential elements of the s. 145(3) offence/breaches of the substantive condition of the Recognizance

[25] Further issues arose during oral argument. Firstly the Crown was of the view that, under either 524(4) (a) or (b) the court should only do "limited weighing" of the credibility of the witnesses presented, as this was not a trial, but rather a hearing premised on a balance of probabilities standard (or the "reasonable grounds to believe" standard). Secondly, the court should only consider whether Mr. Garnier had contravened the substantive provisions of his recognizance or there were reasonable grounds to believe that he had committed an offence under s.

145(3) – therefore, the court should not consider whether he had a "lawful excuse" as is available in s. 145(3) or similarly any excuse-based evidence (e.g. he was asleep and did not become aware of the officer's compliance check activities) in relation to whether he had breached the substantive conditions of his recognizance. [7]

[26] The elements of the s. 145(3) offence were concisely stated by the Manitoba Court of Appeal in *R. v. Custance*, 2005 MBCA 23, leave denied: [2005] SCCA No. 156, at para. 10:

> 1- That the Crown must prove that the accused was bound by an undertaking or recognizance;
>
> 2- That the accused committed an act which was prohibited by that undertaking or recognizance or that the accused failed to perform an act required to be performed by that undertaking or recognizance; and
>
> 3- That the accused had the appropriate *mens rea*, which is to say that the accused knowingly and voluntarily performed or failed to perform the act or omission which constitutes the *actus reus* of the offence. [8]

[27] The court went on to elaborate as follows:

> 12 Gary T. Trotter, in his text *The Law of Bail in Canada*, second edition (Toronto: Carswell 1999) at 449, states that in order to have the requisite mens rea, the accused must **knowingly or recklessly** infringe the conditions of the undertaking. The Crown does not have to prove that the accused intended to breach the recognizance, but rather only that the accused intended to commit the *actus reus*. While recklessness (the conduct of one who sees the risk and nonetheless who takes the chance) will fulfil the *mens rea* requirement, mere carelessness or negligence will not. See…*R. v. Legere* (1995), 95 CCC (3d) 555, at 565 (Ont CA).

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[7] In deciding whether reasonable grounds exist to arrest/detain, police must conduct the inquiry which the circumstances reasonably permit, but must consider any exculpatory, neutral or equivocal information that cannot be disregarded unless they have good reason to believe that it is unreliable – *R. v. Chelil*, 2013 SCC 49; however, that does not impose a duty to undertake further investigation to seek out exculpatory factors or rule out possible innocent explanations (paras. 3-34); *Chartier v.* Quebec [1979] 2 S.C.R. 474, and *R. v. Golub* (1997) 117 CCC(3d) 193 (OCA), at paras. 20-21. Similar reasoning applies when persons are asked to swear informations. I conclude I should, as a judge in any case, only disregard evidence that I find unreliable. The standard to be applied to witnesses credibility is on the balance of probabilities.

[8] Breach of the conditions of a recognizance is a general intent office: see *R. v. Tatton*, 2015 SCC 33. Knowingly, can be proven by reasonable inferences from the accused's conduct (acts/omissions) or through the doctrines of recklessness or willful blindness – see *R. v. Sansregret* (1985) 18 CCC (3d) 223 (SCC) and *R. v. Briscoe*, 2010 SCC 13, respectively.

> The test for *mens rea* is primarily subjective, and in applying the subjective test, the court looks to the accused's intention and the facts as the accused believed them to be.
>
> [my emphasis added]
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> …
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> 24 Once the Crown proves the elements of the offence beyond a reasonable doubt, the onus shifts to the accused to provide a lawful excuse on a balance of probabilities… [26] In this case, conviction might have been avoided if the accused established a lawful excuse by "a showing of due diligence to satisfy the obligation" see *R. v. Ludlow* (1999), 136 CCC (3d) 460, at para. 40 (BCCA).
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> [my emphasis added]

[28] There are very few reported cases involving circumstances similar to those of Mr. Garnier. [9] In *R. v. Qadir*, 2016 ABPC 124, the accused was charged with breach of his recognizance by failing to maintain his curfew at his home, and failing to present himself for a compliance check. In *obiter dicta* comment the court noted that, where persons on bail conditions are required to present themselves for compliance checks, but they were already in bed asleep and did not hear or become aware of the compliance check, such might be considered a lawful excuse under s. 145(3). At para. 44, Judge Fradsham opined that:

> Were it otherwise (i.e. that in order to obtain a conviction the Crown had to prove that the accused had been aware of the peace officer's direction), an absurdity would result because any accused absent from the place he or she was required to be at would have an automatic defence ("the Crown did not prove that I received notice of the peace officer's direction")… to a charge of failing to attend at the door of the residence.… Such a result would make no sense in law.

[29] I disagree. Before the "lawful excuse" – "I was asleep" – is examined, the Crown must first establish the *mens rea* required, either by inference and/or use of the doctrines of recklessness or wilful blindness.

[30] Thus, in this bail revocation hearing, the Crown must establish, *inter alia*, that Mr. Garnier, while bound by his recognizance (which is not in dispute), did fail to attend at the door at 1:20 a.m. on February 18, 2017, to present himself for the compliance check. The *actus reus* has been proved to the thresholds required by s. 524(4)(a) or (b).

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[9] E.g. *R. v. MacFarlane*, 2007 YKTC 35, at para. 6.

[31] The Crown must also establish, by direct evidence or by circumstantial evidence, that Mr. Garnier had the appropriate *mens rea*: that he "knowingly" and voluntarily failed to present himself at the door for the compliance check. Arguably, I may infer that Mr. Garnier was aware of Cst. Campbell's compliance check activities and decided not to present himself at the door.

[32] I must ask myself therefore: am I satisfied that it is more likely than not, that Mr. Garnier "knowingly" and voluntarily failed to present himself at the door for the compliance check? Was he aware that Cst. Campbell was at the house doing a compliance check? [10]

[33] Let me next turn to the evidence presented.

The evidence

[34] I had no hesitation in finding both Constable Campbell and Stevens to be credible witnesses. I found that they dealt with this matter in a professional manner throughout. Based on the evidence presented to me, I am satisfied that at the time Mr. Garnier was arrested, the police had reasonable grounds to believe that an indictable offence had been committed.

[35] Constable Campbell testified that between 1:20 a.m. and 1:36 a.m. on February 18, 2017, he attended at the correct door, being the only usual entrance to the home of Kim Edmunds. That glass and aluminum storm door was locked. It protected the inside door which was also closed. Constable Campbell did the following to get the attention of the occupants of the basement apartment which is where Mr. Garnier was to be (I bear in mind the photographs taken by Constable Fraser at 10 p.m. on February 18, 2017, which give a better visual understanding of the premises):

1. He had the headlights of his police pickup truck on facing the basement windows and door in question;
2. He used the powerful "alley lights to illuminate the house – I saw no movement in the house";

[10] An analogous situation to not being awake to be aware of Cst. Campbell's compliance check is being unaware of the precise terms of a probation order because it was not read to you. As Justice Wilson stated for the court in *R. v. Docherty* [1989] 2 S.C.R. 941, in relation to the latter scenario, at para. 14: "In order to "refuse" to comply with something it is necessary to know what you are not complying with. Only in that event can your actions constitute a "refusal".

3. He used his personal flashlight to shine into the two basement windows to the left of the door in question (I am satisfied that the diagram Exhibit No. 11 is an accurate sketch of the layout of the downstairs apartment – I infer that the windows into which he shone his flashlight and into which the alley lights would have also flooded, did not permit that light to significantly illuminate the area of the bedrooms where Mr. Garnier and Ms. Frances were present, nor where Kim Edmunds was present);

4. He knocked on the glass portion of the outside door with his bare hand – he did so on six occasions – initially only for a few seconds and towards the end for 10 to 15 seconds as hard as he could. His knocking escalated louder and longer each time. At the end he said "I was hammering on the door as hard as I could" (Kim Edmunds stated that that door was approximately 20 feet from her bedroom);

5. Having received no response at that door, he went to the back door of the home which, was not regularly used, but did provide an entryway into the basement area and thereafter into the apartment in question. Ms. Edmunds estimated that door, separated by another door leading into the apartment, was approximately 25 feet away from the bedrooms where the occupants were at the time. Cst. Campbell on two occasions knocked loudly for an extended period of time on that door. He heard nothing from the house and no lights came on at any time.

[36] I accept the evidence of the various witnesses that: Mr. Garnier and Ms. Francis arrived at Kim Edmunds' residence at approximately 6:00 - 6:30 p.m. on February 17, 2017; that the three of them stayed up late, and that they went to bed sometime shortly after 1:00 a.m., although Mr. Garnier and Ms. Francis may have fallen asleep as late as sometime between 1:30 a.m. and 2:00 a.m. They left their bedroom doors open in order to ensure they might hear if the police came for a compliance check.

[37] Ms. Francis described herself as one who "regularly" wakes in the night; "I do not fall asleep easily"; and that she does not sleep well. To her knowledge, there was no time while they were sleeping that Mr. Garnier was not present in the apartment. She at no time woke to hear or see any of the activities associated with Cst. Campbell's compliance check.

[38] Ms. Edmunds is Mr. Garnier's surety. I accept that she was at home at the relevant times. Her car was parked there.

[39] Ms. Edmunds stated that her dog is "sensitive to noise and barks when someone knocks on the door or if she hears a noise outside". She herself testified "I was not totally asleep" as she was expecting there might be a compliance check at some point. She also testified "I usually don't fall asleep right away and don't sleep well". She confirmed that her doorbell was not working however she had a motion sensor light outside of the door in question and that it "illuminates everything". She noted that she is a licenced R.N. and as a result of an injury, she does take a prescription medication which tends to induce her to sleep at night. She at no time woke to hear or see any of the activities associated with Constable Campbell's compliance check. She stated that she believed both Ms. Francis and Mr. Garnier also take similar sleep inducing medications.

[40] Mr. Garnier stated that previously when he had been at his mother's residence, the Cape Breton Regional Police attended in the mid-morning or late evening to do their compliance checks. Because they were all concerned that there had been no compliance check that evening, they left their bedroom doors open. He had his phone with him on full volume ring tone. He at no time woke to hear or see any of the activities associated with Constable Campbell's compliance check. He was adamant that he did not knowingly violate the conditions of his recognizance, though he did concede that it would have been shortly after they had fallen asleep when Constable Campbell arrived. He believed that by giving his cell phone number on the court ordered check-in sheet (Exhibit 10) at the Halifax Regional Police, that they would therefore enter that number into their system and would be able to call him on his cell phone at any time. On February 17, 2017, he did call the Halifax Regional Police check in answering service to advise that he was going to Cape Breton on February 17 to stay at his mom's residence, returning on February 19, 2017 to Halifax, although he said he did not leave his cell phone number with the service at that time.

[41] Based on the evidence provided, only some of which I have summarized above, am I satisfied that it is more likely than not that Mr. Garnier "knowingly" and voluntarily failed to present himself for the compliance check when Constable Campbell was present between 1:20 a.m. and 1:36 a.m. on February 18, 2017?

[42] On the one hand, I have the credible evidence of Cst. Campbell, who was purposefully there for 16 minutes to rouse the occupants of the home in order to have Mr. Garnier present himself for a compliance check. I also have the evidence that the occupants, went to bed sometime around 1:00 a.m. and that likely Ms. Francis and Mr. Garnier did not fall asleep until around 1:30 a.m. On the other hand, I have the fact that Cst. Campbell had to be somewhat restrained in his pounding on the door in question because he was pounding on a pane of glass. Moreover, behind that door, and muffling the sound to some extent, was another door. The lighting Cst. Campbell used probably did not penetrate in any material way the interior area of the basement where the occupants were sleeping. If indeed, Ms. Edmunds' dog was present and has the characteristics of being "sensitive" to noises, which I accept to be the case, it is surprising that the dog did not react to Constable Campbell's compliance check activities, unless those activities were insufficient to wake the dog. Had the dog woken, and if the occupants woke and could hear Cst. Campbell, it likely would have made its presence known to such an extent that Constable Campbell could have heard it. He did not hear the dog. To that point, there had not been any compliance checks by CB Regional Police after midnight. Kim Edmunds had provided her longstanding cellular and home landline telephone numbers to the local police. Mr. Garnier had provided his cell phone and Bedford residence telephone numbers to the Halifax Regional Police by writing them on the top of the "check-in" sheet at the Gottingen Street Police Station. He was not obligated under conditions of his recognizance to: advise police when he was travelling to Cape Breton, but he did so at 12:41 p.m. on February 17, 2017; advise police when on Saturdays he was taking his "personal needs" two (2) hours, but he did so at 2:20 p.m. on February 18, 2017, by calling and leaving a message on the Halifax Regional Police answering service for such calls.

[43] During the compliance check at 1:20 a.m., Cst. Campbell did not attempt to call Kim Edmunds' telephone number, nor that of Mr. Garnier; neither did Halifax Regional Police after their unsuccessful compliance check on February 17, 2017, at sometime before Cst. George Farmer's call to Angela Garnier at 4:18 a.m. on February 18, 2017.

[44] Can I infer from all the evidence that I accept, that it is more likely than not that Mr. Garnier was aware of, and "knowingly" and voluntarily failed to present himself for the compliance check at 1:20 a.m. on February 18, 2017?

[45] Although in the context of trial proceedings, some of Justice Cromwell's observations in *R. v. Villaroman*, 2016 SCC 33, are relevant to my assessment of the evidence:

> Whether the Inference Must Be Based on "Proven Facts"
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> 35 At one time, it was said that in circumstantial cases, "conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from proven facts": see *R. v. McIver*, [1965] 2 O.R. 475 (C.A.), at p. 479, aff'd without discussion of this point [1966] S.C.R. 254. However, that view is no longer accepted. In assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts: *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104, at para. 58; see also *R. v. Defaveri*, 2014 BCCA 370, 361 B.C.A.C. 301, at para. 10; *R. v. Bui*, 2014 ONCA 614, 14 C.R. (7th) 149, at para. 28. Requiring proven facts to support explanations other than guilt wrongly puts an obligation on an accused to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by considering all of the evidence. The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt.
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> 36 I agree with the respondent's position that a reasonable doubt, or theory alternative to guilt, is not rendered "speculative" by the mere fact that it arises from a lack of evidence. As stated by this Court in *Lifchus*, a reasonable doubt "is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence": para. 30 (emphasis added). A certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.
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> 37 When assessing circumstantial evidence, the trier of fact should consider "other plausible [page1020] theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt: *R. v. Comba*, [1938] O.R. 200 (C.A.), at pp. 205 and 211, per Middleton J.A., aff'd [1938] S.C.R. 396; *R. v. Baigent*, 2013 BCCA 28, 335 B.C.A.C. 11, at para. 20; *R. v. Mitchell*, [2008] QCA 394 (AustLII), at para. 35. I agree with the appellant that the Crown thus may need to negative these *reasonable* possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused": *R. v. Bagshaw*, [1972] S.C.R. 2, at p. 8. "Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.
>
> 38 Of course, the line between a "plausible theory" and "speculation" is not always easy to draw. But the basic question is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty.
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> 39 I have found two particularly useful statements of this principle.

> 40 The first is from an old Australian case, *Martin v. Osborne* (1936), 55 C.L.R. 367 (H.C.), at p. 375:
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> In the inculpation of an accused person the evidentiary circumstances must bear no other reasonable explanation. This means that, according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed. [Emphasis added.]
>
> 41 While this language is not appropriate for a jury instruction, I find the idea expressed in this passage - that to justify a conviction, the circumstantial evidence, assessed in light of human experience, should be such that it excludes any other reasonable alternative - a helpful way of [page1021] describing the line between plausible theories and speculation.
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> 42 The second is from *R. v. Dipnarine*, 2014 ABCA 328, 584 A.R. 138, at paras. 22 and 24-25. The court stated that "[c]ircumstantial evidence does not have to totally exclude other conceivable inferences"; that the trier of fact should not act on alternative interpretations of the circumstances that it considers to be unreasonable; and that alternative inferences must be reasonable, not just possible.
>
> 43 Where the line is to be drawn between speculation and reasonable inferences in a particular case cannot be described with greater clarity than it is in these passages.

[46] I am not satisfied that it is more probable than not that Mr. Garnier was aware of, and therefore "knowingly" and voluntarily failed to present himself for the compliance check at or about 1:20 a.m. on February 18, 2017. I am satisfied it is more probable than not that Mr. Garnier was present at Kim Edmunds' residence at the relevant time.

[47] Turning briefly to the Crown's alternate submission. These relate to the dates December 30, 2016 and February 18, 2017. The evidence demonstrates that Mr. Garnier attended at his grandparents home in North Sydney on these two occasions for a period significantly less than two hours, under the purported exception in his recognizance that allowed him such a outing "for personal needs".

[48] The Crown argues that this is a contravention of the substantive condition of his recognizance, and that there is evidence that it is more likely than not that he did so.

[49] The words in the recognizance were specifically authored by Justice Gabriel on December 20 ("he will be entitled to one two hour period each week on Saturdays in the actual presence of one or more of his sureties to attend to personal needs" – p. 98(5) transcript). He did not elaborate thereon.

[50] Mr. Garnier and his witnesses, did not conceal the fact that he had taken the opportunity to visit his grandparents for approximately an hour on February 18, 2017. He also acknowledged he had done so on December 30, 2016 when he was visiting his mother. The evidence is not disputed that his grandparents are both elderly, very ill and unable to travel to Halifax. It is also undisputed that he has been seeing a psychologist while on release. He testified that his psychologist told him that it would be beneficial for him to spend significant time with his close family in order to improve his mental health issues. He stated he was "very close" to his paternal grandparents. He viewed it as within the wording of "personal need" as a result of the foregoing. I note on February 18, 2017, he also attended at a bank to do some banking, which likely would constitute "personal needs".

[51] There was very little detail about the circumstances of his visit December 30, 2016, and no charges have yet been laid in relation to that alleged contravention of his bail conditions.

[52] The burden is on the Crown to satisfy me that it is more likely than not that he contravened a substantive condition of his recognizance on these dates. I am not so satisfied on the basis of the evidence which I accept.

Conclusion

[53] In summary, I find that the Crown has not satisfied me under s. 524(4)(a) that Mr. Garnier has contravened the substantive provisions of his recognizance on December 30, 2016 or February 18 2017.

[54] Therefore, I find his continued detention on these charges is no longer justifiable, and order his immediate release on these charges on the existing bail conditions entered into on December 20, 2016, upon my signing the appropriate order. [11]

[11] The Crown had two means of dealing with Mr. Garnier's bail: the alleged breach of the substantive conditions of his bail can be dealt with under s. 524; and the Crown can seek a show cause on the new charges under s. 515 – *R. v. Yarema*, [1991] O.J. No. 712 (OCA), at paras. 17-18. The new charges and bail in relation thereto remain outstanding in Provincial Court.