Date: 20020530
Docket: CAC172658

NOVA SCOTIA COURT OF APPEAL
[Cite as: *R. v. J.G.V.B.*, 2002 NSCA 65]

Roscoe, Freeman and Hamilton, JJ.A.

BETWEEN:

J.G.V.B. (YOA)

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

Counsel:	Lawrence L. O'Neil for the appellant Laurel Halfpenny-MacQuarrie, for the respondent
Appeal Heard:	April 5, 2002
Judgment Delivered:	May 30, 2002

THE COURT: Leave to appeal is granted, the appeal is allowed and the decision of Judge John A. MacDougall is reinstated, per reasons for judgment of Hamilton, J.A., Roscoe and Freeman, JJ.A., concurring.

Publishers of this case please take note that s.38(1) of the **Young Offenders Act** applies and may require editing of this judgment or its heading before publication. Section 38(1) provides:

> 38(1) No person shall publish by any means any report
>
> (a) of an offence committed or alleged to have been committed by a young person, unless or order has been made under section 16 with respect thereto, or
>
> (b) of a hearing, adjudication, disposition or appeal concerning a young person who committed an offence
>
> in which the name of the young person, a child or a young person aggrieved by the offence or a child or a person who appeared as a witness in connection with the offence, or in which any information serving to identify such young person, is disclosed.

Hamilton, J.A.:

[1] The appellant, J. G. V.B., was charged with causing a disturbance, by fighting, contrary to s. 175(1)(a) of the ***Criminal Code*** as well as a breach of probation contrary to s. 26 of the ***Young Offenders Act***. The matter came for trial before Judge John D. MacDougall, on January 3, 2001. After the Crown presented its case, a motion for a directed verdict was made by defence counsel. Judge MacDougall granted the motion which had the effect of the appellant being found not guilty on both counts.

[2] The Crown appealed to the Supreme Court of Nova Scotia against the acquittal. That appeal was heard by Justice Hiram Carver on June 12, 2001, wherein he directed that the dismissal be quashed and ordered a new trial. The appellant now applies for leave to appeal and, if granted, appeals to this court from the decision of Justice Carver under s. 839(1) of the ***Criminal Code,*** which provides for an appeal on a question of law alone.

[3] Section 175(1)(a) makes it an offence to cause a disturbance in or near a public place by, *inter alia*, fighting, screaming, shouting, swearing, singing or using insulting or obscene language. It reads as follows:

> **175.** (1) Every one who
>
> (*a*) not being in a dwelling-house, causes a disturbance in or near a public place,
>
> (i) by fighting, screaming, shouting, swearing, singing or using insulting or obscene language,
>
> (ii) by being drunk, or
>
> (iii) by impeding or molesting other persons, ...
>
> is guilty of an offence . . .

[4] The appellant states the issues as follows:

> The ground of appeal is:

> That the Summary Conviction Appeal Court erred in overturning the decision of the trial court and in finding any evidence that could possibly lead to a conviction of the Appellant.

It is submitted that the following are the issues that arise:

> (1) What are the elements of the offence of disturbance by fighting as prohibited by s. 175(1)(a) of the Criminal Code, R.S.C. 1985, c. C-46?
>
> (2) What is the law governing the granting of a directed verdict?
>
> (3) Did the Summary Conviction Appeal Court apply the law governing the granting of a directed verdict?
>
> (4) Did the Summary Conviction Appeal Court identify evidence that could lead a trier of fact acting reasonably to satisfy itself beyond a reasonable doubt of the Appellant's guilt?"

[5] The test to be applied by an appellate court from a summary conviction appeal was enunciated by this court in ***R. v. Cunningham*** [1995] N.S.J. No. 313 wherein Justice Bateman stated at page 3:

> An appeal of the decision of a summary conviction appeal judge pursuant to s. 839 of Criminal Code, requires leave of the Court and is limited to questions of law.
>
> Such an appeal is not a second appeal against the judgment at trial, but rather an appeal against the decision of the judge of the summary conviction appeal court (*R.v. Emery* (1981), 61 C.C.C. (2d) 84 (B.C.C.A.)). The error of law required to ground jurisdiction in the Court of Appeal is that of the summary conviction appeal judge, not the trial judge.

[6] In ***R. v. Surette*** [1993] N.S.J. No. 228 Justice Hallett stated at page 6:

> Unlike the scope of appeal to the summary conviction appeal court, it is not open to this court, by reason of the limitation of appeals to questions of law to review the sufficiency of evidence and determine if Judge Hall drew the proper inferences from the evidence in concluding that the acquittal ought to be affirmed. ...The inferences from proven facts are not questions of law but questions of fact.

[7] There is no dispute on the facts. The appellant and another young person were preparing to fight one another just outside a mall. They were told by a mall employee not to fight at the mall and they moved to an open area that serves as a shortcut from the mall to St. Francis Xavier University, known as "Liquor Lane". It is described as being two or three hundred yards wide, with trees on the left hand side and residences on the hill to the right. The location of the fight was about 100 yards from the street. The evidence indicates the fight consisted of one participant blocking the swings of the other. The respective friends of the participants, approximately five or six in number, were with them at the mall and followed them to "Liquor Lane". There is no evidence anyone other than the friends who followed them to "Liquor Lane", saw or heard the fight.

[8] There is no dispute the test for a directed verdict is that the accused must be committed for trial in any case in which there is admissible evidence which could, if it were believed, result in a conviction. **R. v. Martell** [1999] N.S.J. No.11 (C.A.).

[9] Judge MacDougall stated in his decision:

> As the parties removed themselves to Liquor Lane was there a disturbance caused on Liquor Lane? **Lohnes** indicate - states that there has to be someone disturbed other than the officer who attends and is attracted to the, ah, location. Which of the individuals were disturbed? Well there's no evidence that anyone was disturbed. Were they distracted from what they would ordinarily be doing? Well if a person wants to sit around and wait for fights to occur on Liquor Lane they're certainly not going to be distracted. The individuals who were - who followed the two combatants from the mall to Liquor Lane may very well have been doing something else. But at the point where they were standing in Liquor

> Lane they were doing exactly what they wanted to do. They weren't being distracted, they were being entertained. Um, I don't see that-I th-I think there has to more (sic), and I take it from the intrusion on public liberty. These individuals were not being intruded on-upon, ah, when they went down to Liquor Lane. They were going there for the specific purpose of seeing the fight. There was no interference in their public liberty.
>
> There was no disturbance in my opinion. Ah, there's-I think it's very analogous to the, ah, situation of a fight at a-ah, at an athletic contest. Ah, the people have to-there has to be something. The di-word disturbance has to mean something. And if no one is disturbed in the ordinary use of the-of the premises upon which-or the public space upon which the fight takes place then how can there be an-an offence committed.

[10] Justice Carver found that Judge MacDougall erred in granting the directed verdict and stated:

> Here as stated above you had a fight going on in a public place which distracted their followers from what they originally intended to do. This fight interfered with the public's normal activities on Liquor Lane. Their followers were members of that public.

[11] These statements suggest that when Justice Carver considered whether there was any admissible evidence, that he interpreted "interference" to include interference in the sense that if the friends had not left the mall and gone to Liquor Lane because of the pending fight, they would have been doing something else somewhere else. This interpretation is too broad.

[12] The seminal case on what constitutes a disturbance for the purpose of s. 175(1)(a) is **R v. Lohnes**, [1992] 1 S.C.R.167. In the **Lohnes** case the accused shouted obscenities from the verandah of his house at his neighbour. The issue before the court was whether foreseeable emotional upset was sufficient to cause a disturbance or whether there had to be an externally manifested disturbance. McLachlin, J., as she then was, noted on page 170 that "there was no evidence

anyone besides the neighbour heard the accused or that the neighbour's conduct was affected by the shouts".

[13] In the penultimate paragraph of the **Lohnes** case McLachlin, J. stated:

> The trial judge applied the mental disturbance test, convicting on the basis that an 'ordinary reasonable individual would be disturbed by language of that nature being shouted in a public area'. The convictions were upheld. In denying leave to appeal, the Court of Appeal agreed that language such as that used by the accused was 'inherently disturbing and was of itself a disturbance'(p.270). There was no finding that the conduct of the complainant or anyone else was affected or disturbed by the language. In the absence of such findings, the convictions cannot stand.

[14] The second last sentence indicates that in order for there to be a disturbance, someone must have been affected or disturbed by the activity. This principle was applied in cases referred to in **Lohnes**: **R. v. Chikoski** (1973**)**, 14 C.C.C. (2d) 38 (Ont. Prov. Ct.); **R. v Peters**, (1982), 65 C.C.C. (2d) 83; **R. v. Allick [**B.C.S.C., February 20, 1976 (unreported)] cited in **Peters**, and has been applied in cases since **R. v. Gallant,** [1993] P.E.I.J. No. 91 **(P.E.I.C.A.)**; **R. v. Roy**, [1996] N.S.J. No. 151 (N.S.C.A.); **R. v. Sock**, [1993] P.E.I.J. No. 97 (P.E.I.S.C.T.D.); and **R. v. Terrigno** (1995),101C.C.C. (3d) 346 (Alta. Prov.Ct.).

[15] To constitute a disturbance for the purpose of s.175(1)(a) in this case, there must be someone whose use of Liquor Lane was disturbed. Here there was no one whose use of Liquor Lane was interfered with. The friends' use of Liquor Lane was not interfered with. The only reason they went there was because of the pending fight. They would not have been there otherwise. There is no evidence that anyone other than the friends saw or heard the fight.

[16] The Crown argued that no one has to be actually disturbed to cause a disturbance, that the disturbance occurs when an activity, such as a fight, takes place in a public area not held out to be a place where people go to watch fights. I disagree. While in some cases a fight itself may amount to a disturbance, this is not

always the case. At page 182 of the **Lohnes** case McLachlin, J.A. used a fight as an example of when an activity of itself could amount to a disturbance when she stated:

> The disturbance may consist of the impugned act itself, as in the case of a fight interfering with the peaceful use of a barroom, or it may flow as a consequence of the impugned act, as where shouting and swearing produce a scuffle.

[17] I do not read this sentence to mean that all fights of themselves, that take place in a public place other than a place where people go expecting to see fights, are disturbances. That issue was not before the court in the **Lohnes** case. If McLachlin, J. had intended to interpret s.175(1)(a) to provide that all fights were a disturbance of themselves, she would have said so directly rather than expressing the example of the fight in terms of its effect, interfering with the peaceful use of the barroom. Neither the trial judge nor the summary conviction appeal judge erred in not considering the fight in this case to be a disturbance of itself given the fact the participants moved from the mall, where they first talked of fighting, to an open area where there were no other persons besides their friends, and that the fight consisted of one party blocking the swings of the other, according to the evidence at trial.

[18] The Crown argued the appeal must be dismissed because we are bound by the decision of this court in **R. v. Roy**, [1996] N.S.J. No.151 (N.S.C.A.). If that case stood for the principle, that a fight in a public place plus a crowd constitutes a disturbance for the purpose of section 175(1)(a), the Crown would be correct. I am satisfied that case does not stand for such a principle and requires, in addition to a fight plus a crowd, interference with the use of the public place where the fight takes place, because at ¶ 21 the court in the **Roy** case states:

> The disturbance consisted of the impugned act itself, a fight, witnessed by a crowd of people, interfering with the peaceful use of the parking lot.

[19] The facts in the **Roy** case are also different than in this case. The facts in the **Roy** case are set out summarily, and it is somewhat difficult to compare some

aspects of them with some aspects of the facts in this case. However from reading the **Roy** decision it appears the crowd at the fight was large, its composition changing, and that not all persons had moved to the parking lot where the fight took place specifically because of the pending fight. This suggests that the use some members of the crowd were making of the parking lot at the time of the fight was interfered with as a result of the fight. This is suggested by the policeman's evidence, including his evidence that he was not sure how big the crowd was because people were "continually coming". His evidence also suggests that the fight was escalating when he stated that he took steps "to quell the problem because it was starting to get out of hand" and that Roy took off shouting that he wanted to fight with three people, as the policeman was trying to get Roy into his vehicle.

[20] This differs from the present case where the crowd was five or six friends throughout, who had all specifically left the mall and gone to Liquor Lane because of the fight and there is no evidence anything was getting out of hand.

[21] There is also a difference in the location of the fight in **Roy**, just outside a busy pub in a five-car parking lot, beside a restaurant. In the present case the participants and the crowd intentionally left the mall and went to a more remote area two or three hundred yards wide, with trees on the left hand side and residences on the hill to the right and fought 100 yards from the street.

[22] Accordingly, Justice Carver erred in law in misinterpreting the law and overturning the decision of Judge MacDougall. In light of this error of law, I would grant leave to appeal, allow the appeal and restore the decision of Judge John A. MacDougall and reinstate the acquittal of the appellant.

Hamilton, J.A.

Concurred in:

Freeman, J.A.

Roscoe, J.A.