NOVA SCOTIA COURT OF APPEAL
Citation: R. v. Hope, 2007 NSCA 103

Date: 20071030
Docket: CAC 279514
Registry: Halifax

Between:

John Hope

Appellant

v.

Her Majesty the Queen

Respondent

Judge(s):	Bateman, Hamilton, Fichaud, JJ.A.
Appeal Heard:	September 24, 2007, in Halifax, Nova Scotia
Held:	Leave to appeal is granted and the appeal is allowed per reasons for judgment of Fichaud, J.A.; Bateman and Hamilton, JJ.A. concurring.
Counsel:	Duncan Beveridge, Q.C. and Patrick Duncan, for the appellant Peter Rosinski, for the respondent

Reasons for judgment:

[1] Halifax Police Constable John Hope arrested Ms. Silver at her doorstep on a charge that she uttered a death threat. Ms. Silver resisted and retreated into her house. Cst. Hope followed her inside and physically subdued and handcuffed her. Cst. Hope was charged with common assault under the *Criminal Code*. His defence was that he was a peace officer acting with legal authority. The Crown agrees that if the arrest at the doorstep was lawful, then Cst. Hope lawfully entered the home to apprehend her in hot pursuit of an individual who was escaping lawful custody. The main issue was whether the doorstep arrest was lawful. The trial judge held that it was, and acquitted Cst. Hope. The Summary Conviction Appeal Court set aside the acquittal and ordered a new trial. Cst. Hope appeals, and asks this court to reinstate his acquittal.

Background

[2] The following facts are recited in the trial judgment.

[3] Constables Hope and Mark Galloway of the Halifax Regional Police Service worked the night shift on September 24, 2004. They responded to a complaint that Suzanne Silver had uttered a death threat against Elizabeth Glasgow. At 9:45 p.m. the officers went to Ms. Glasgow's address to interview her. Ms. Glasgow's son was to be a witness in a potential homicide prosecution of Ms. Silver, and had entered witness protection that day. The officers knew Ms. Silver had been involved with drug and weapons offences and learned from police records that Ms. Silver had pending charges for assault on a police officer and breach of probation conditions.

[4] The officers drove to Ms. Silver's address to arrest her for the charge of uttering a death threat. Constables Hope and Calloway were accompanied by two members of the RCMP as backup. At the Silver residence, Constables Hope and Galloway went to the doorstep, while the RCMP officers stood at the bottom of the front steps.

[5] The testimony of Constable Hope and of Ms. Silver differed as to the events at the doorstep and afterward. The trial judge accepted the evidence of Cst. Hope over that of Ms. Silver. The following is a summary of Cst. Hope's testimony, as

related in the trial judgment. Cst. Hope, with Cst. Galloway at the doorstep, knocked on the door. There was no response, after which Cst. Galloway left to check the side of the house. Then, according to the trial judge:

> [12] . . . Constable Hope knocked again and Ms. Silver opened the door, and ***with her hand on the doorjamb*** asked "What the f--k do you want?" As the defendant explained why he was there, Ms. Silver replied she didn't know "any f--king Elizabeth Glasgow", which evidence I note was corroborated both by the crown's civilian witnesses who were inside the house and by the crown's R.C.M.P. witnesses who were outside the doorway. Constable Hope testified that he quickly determined that verbal efforts were unlikely to produce compliance by Ms. Silver. He felt he needed to arrest Ms. Silver to prevent a further commission of an offence by her, and so ***he advised Ms. Silver two times that she was under arrest and then touched her sleeve, whereupon Ms. Silver began her retreat into the residence***, causing him to determine he would have to move from verbal to physical tactics to restrain Ms. Silver. ***Constable Hope crossed the threshold to control Ms. Silver's movements***, to prevent her from retreating into the residence with which he was unfamiliar, and to handcuff her. At that point he was joined by the defendant Galloway who assisted him in trying to restrain and cuff the physically non-compliant suspect. [emphasis added]

I have emphasized passages that will pertain to the analysis.

[6] The officers took Ms. Silver to the police station for booking. At the station Ms. Silver resisted physically, assaulted another officer and had to be tasered.

[7] The Crown charged Constables Hope and Galloway each with common assault (s. 266(b) of the *Code*) for using force to apprehend Ms. Silver in her home and with assault using a weapon (s. 267(a) of the *Code*) for using the taser at the police station.

[8] Judge Beaton of the Provincial Court heard the trial in November 2005 and January 2006, and issued an oral decision on March 24, 2006 followed by a written decision on April 3, 2006 (2006 NSPC 12). Judge Beaton acquitted Constables Hope and Galloway of all charges.

[9] The charges of assault with a weapon, concerning the events at the station, are not under appeal to this court. So I have not related those facts.

[10] Respecting the events at Ms. Silver’s home, the trial judge said:

> [33] Where the evidence of Constable Hope as to the events at the door, leading to the arrest of Ms. Silver, differs from the evidence of Ms. Silver, ***I accept the evidence of Constable Hope and I am left in no doubt that the arrest was a lawful one***. I do not, on the facts, accept the crown's assertion that the officers should have obtained a warrant after they determined Ms. Silver was in the home. The defendants may have hoped that Ms. Silver would be home, and checking her residence was an obvious early step in locating her, but once that fact materialized, the immediate ferocity of Ms. Silver's replies, her obvious lack of cooperation and Constable Hope's concern for the safety of Elizabeth Glasgow dictated that he make a quick decision about gaining her cooperation in the arrest process. As a result of Ms. Silver's words, combined with what he knew about her it is not surprising, and in my view given Constable Hope's training, indeed entirely reasonable that Constable Hope determined very quickly that things were unlikely to proceed smoothly such that he could expect Ms. Silver to calmly cooperate with the arrest process. Ms. Silver opened the door and the defendant Hope was within reach of her; she was using profanity as he told her why he was there, and he had a heightened sense of safety concerns based on his previous information about her. The home had been to that point poorly lit and Constable Hope had no idea who else might be there**. *In that moment, I am satisfied, he determined that Ms. Silver was a person upon whom he had to lay hands, applying the lower end of the continuum of force scale to obtain compliance, all after he had pronounced the words of arrest. Constable Hope placed his hand on Ms. Silver's sleeve.*** From there, it is entirely clear from the evidence of all crown witnesses then present, with the exception of Ms. Silver herself, that she demonstrated a level of noncompliant, uncooperative, and by times combative resistance that necessitated both defendants to make repeated physical contact with her in their efforts to remove her from the home and de-escalate the situation. I am not persuaded there was a premeditated plan by the defendants to arrest Ms. Silver inside the home, without a warrant. [emphasis added]

[11] The Crown appealed under s. 813 of the *Code* to the Supreme Court of Nova Scotia, as Summary Conviction Appeal Court ("SCAC"). The Crown appealed all four acquittals, ie. the acquittals of each officer for the events at Ms. Silver's home and the events at the station.

[12] Justice Pickup heard the Crown's appeal to the SCAC on February 21, 2007 and issued a written decision on March 7, 2007 (2007 NSSC 71). The SCAC dismissed the Crown's appeal from both acquittals of Cst. Galloway and from the acquittal of Cst. Hope on the 267(a) charge for the events at the police station. The SCAC allowed the Crown's appeal from the acquittal of Cst. Hope on the s. 266(b)

charge for the events in Ms. Silver's home, and ordered a new trial on that charge. Only the ruling on Cst. Hope's s. 266(b) charge is appealed to the Court of Appeal.

[13] As I will discuss, the characterization of the issues that were appealed to the SCAC is important for analysis of the issue before the Court of Appeal. The Crown's notice of appeal to the SCAC stated the grounds of appeal as:

> The Grounds of this appeal are:
>
> 1. that the learned trial judge erred in law in finding that the Respondents' application of any force to Suzanne Silver was lawful.
>
> 2. that the learned trial judge erred in law in failing to state adequate reasons for that finding.

The SCAC judge's decision noted that the Crown had withdrawn its second ground of appeal:

> [2] The Crown appeals the verdicts on the grounds that the learned trial judge erred in law in holding that the force the respondents applied was lawful and on the basis that inadequate reasons were given for that finding. At the hearing of the appeal, the Crown withdrew the second ground of appeal.

The Appeal Record to the SCAC, prepared by the Crown, excluded the transcript of the trial in the Provincial Court. In correspondence to the Court of Appeal, responding to an inquiry from the court about the absence of the transcript, counsel for the Crown wrote:

> The transcript of the trial was not part of the appeal book presented to the summary conviction appeal court, by agreement of counsel;

The SCAC decision characterized the issue as purely legal:

> [4] The appellant alleges an error of law by the learned trial judge. The appellant has made no representations with respect to the correctness or reasonableness of the trial judge's findings of fact, therefore, the standard of review to be applied to the alleged error of law is correctness.

[14] Concerning the charge against Cst. Hope for the events at Ms. Silver's house, the SCAC judge recited these facts:

> [11] Constable Hope asked Ms. Silver if she was Suzanne Silver and she said she was. He indicated they were investigating a death threat complaint by Elizabeth Glasgow. Ms. Silver denied knowing such a person. Constable Hope then told Ms. Silver that she was under arrest, ***reached through the open door and placed his hands on her sleeve*.** Ms. Silver pulled away and Constable Hope entered the home, followed by Constable Galloway. Ms. Silver was pushed face first against the wall, just inside the door, and handcuffed. [emphasis added]

[15] The SCAC judge then made the following findings respecting the location of the arrest:

> [43] With respect to the point of arrest, I cannot conclude, as argued by the respondent Hope, that the trial judge found that the arrest was effected outside the residence. There is no foundation in the decision to suggest that this was her finding. In fact, the trial judge did not make any specific finding as to where the arrest occurred. I am satisfied from a review of the decision that the trial judge's references to the evidence would suggest that Constable Hope was outside the door and the complainant was inside at the time Constable Hope purported to make the arrest. For example, at p. 19, lines 13 - 18, the trial judge stated:
>
> > In cross-examination, the Defendant Hope underscored the factors that led him to cross the threshold of Ms. Silver's home without a **Feeney** warrant, being that he intended to arrest her if she was located at home, which was logical place to begin to look for her and to do so by verbally gaining her co-operation which was his usual practice when effecting an arrest. [SCAC's emphasis]

[16] The SCAC judge considered Justice Sopinka's decision in *R. v. Feeney*, [1997] 2 S.C.R. 13, that discussed the avenues by which a police officer may lawfully enter a home to arrest or apprehend an occupant. Cst. Hope had neither Ms. Silver's consent to enter nor a warrant. In the view of the SCAC judge, the arresting touch contacted Ms. Silver's sleeve inside Ms. Silver's home. This meant there was no foundation for the hot pursuit doctrine to enable an apprehension in the home of a person escaping lawful custody outside the home. Section 529.3 of the *Criminal Code,* enacted after *Feeney*, entitles an officer to enter a home and arrest or apprehend on certain conditions where there are "exigent circumstances". The SCAC judge concluded:

> [51] I am satisfied that the trial judge erred in concluding that the circumstances justified a warrantless arrest inside the dwelling. There is no

> discussion of, nor does there exist grounds for an argument based on "hot pursuit", nor exigent circumstances.

[17] According to the SCAC judge, the trial judge wrongly ruled that the apprehension of Ms. Silver inside her home was lawful. He set aside Cst. Hope's acquittal of common assault and ordered a new trial.

[18] Cst. Hope applies for leave to appeal to the Court of Appeal under s. 839 of the *Code*. He says that the SCAC judge erred in law. In the Court of Appeal, the Crown as respondent tendered extracts from the transcript, apparently in recognition that those passages may be pertinent to the issues in dispute.

Issue

[19] The issue is whether the SCAC erred in law by setting aside the acquittal and ordering a new trial on the charge that Cst. Hope committed common assault in Ms. Silver's residence. Section 839(1) permits an appeal on the ground that the SCAC erred in "law alone". An error in the SCAC's application of the legal principles governing the scope of its review of the trial verdict is an appealable error of law. See *R. v. C.S.M.*, 2004 NSCA 60, at ¶ 26, and cases there cited.

The Scope of Review Available to the SCAC

[20] In *R. v. Nickerson* (1999), 178 N.S.R. (2d) 189, [1999] N.S.J. No. 210 (C.A.) at ¶ 6, an often quoted passage, Justice Cromwell set out the principles governing the SCAC's review of a trial decision:

> 6 The scope of review of the trial court's findings of fact by the Summary Conviction Appeal Court is the same as on appeal against conviction to the Court of Appeal in indictable offences: see sections 822(1) and 686(1)(a)(I) and *R. v. Gillis* (1981), 60 C.C.C. (2d) 169 (N.S.S.C.A.D.) per Jones, J.A. at p. 176. Absent an error of law or a miscarriage of justice, the test to be applied by the Summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence. As stated by the Supreme Court of Canada in *R. v. Burns*, [1994] 1 S.C.R. 656 at 657, the appeal court is entitled to review the evidence at trial, re-examine and re-weigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions. If it is, the Summary Conviction Appeal Court is not entitled to substitute its view of the evidence for that of the trial judge. In short, a

> summary conviction appeal on the record is an appeal; it is neither a simple review to determine whether there was some evidence to support the trial judge's conclusions nor a new trial on the transcript.

[21] The unusual convergence of procedural circumstances in this case limited the SCAC's review menu in two further respects:

(a) The Crown's notice of appeal to the SCAC stated two grounds of appeal. At the SCAC hearing the Crown dropped the second ground (insufficient reasons under *R. v. Sheppard*, [2002] 1 S.C.R. 869). So the SCAC could not entertain a *Sheppard* species of challenge to the sufficiency of the trial judge's reasons.

(b) The only remaining ground of appeal was that the trial judge "erred in law in finding that the respondents' application of any force to Suzanne Silver was lawful." The notice of appeal did not challenge the reasonableness of the trial judge's findings or say that the findings were unsupported by the evidence. By agreement of counsel, the Crown did not include the transcript of evidence in the Appeal Book to the SCAC. The SCAC's decision said that the Crown "has made no representations with respect to the correctness or reasonableness of the trial judge's findings of fact, therefore, the standard of review to be applied to the alleged error of law is correctness." A challenge to the reasonableness of the verdict involves a legal standard, and so is an issue of law for jurisdictional purposes: *R. v. Biniaris*, [2000] 1 S.C.R. 381, at ¶ 23. Nonetheless, to consider the verdict's reasonableness, the appeal court must evaluate the evidence: *Biniaris*, at ¶ 37-42; *R. v. Beaudry*, [2007] 1 S.C.R. 190 at ¶ 79, 96-98; *CSM* at ¶ 37-56. Here the evaluation of evidence was not appealed to the SCAC. It was not open to the SCAC judge to rule that the trial judge's findings were unreasonable or unsupported by the evidence or should be varied. For a similar ruling, see *R. v. Fowler*, 2006 NBCA 90, at ¶ 19.

[22] It is from the perspective of this limited scope of permissible SCAC review that I will consider whether the SCAC erred in law.

[23] The Crown asks this court to confirm that, notwithstanding the comments in *Biniaris* ¶ 23-35 respecting the process in indictable appeals, the Crown may still appeal a summary "unreasonable acquittal" to the SCAC, as provided in *R. v. Antonelli* (1977), 38 C.C.C. (2d) 206 (B.C.C.A.) which was followed in *R. v. Surette*, [1993] N.S.J. No. 228 (C.A.) and other cases. I make no comment on that issue, because the point is unnecessary to decide this appeal. For the reasons I have stated, the scope of review available to the SCAC, in this case, excluded the evaluation of evidence that is necessary to assess the verdict's reasonableness. My reasons are unrelated to whether or not *Biniaris* may have affected the *Antonelli* principle for Crown summary appeals.

The Scope of Review
Undertaken by the SCAC

[24] The main issue before the trial judge was the lawfulness of Cst. Hope's entry into the Silver residence. If the entry was lawful, then Cst. Hope's apprehension of Ms. Silver satisfies the defence afforded by s. 25(1)(b) of the *Code*. Framing this issue are legal principles that are not in dispute.

[25] In *R. v. Feeney*, [1997] 2 S.C.R. 13, Justice Sopinka for the majority (¶ 42-51) held that, without consent or a warrant, a police officer may enter a private residence to arrest only in cases of hot pursuit and, perhaps but without deciding, in exigent circumstances. Since *Feeney*, Parliament has enacted s. 529.3 of the *Criminal Code* to define the conditions for entry in "exigent circumstances".

[26] I note that in *R. v. Godoy*, [1999] 1 S.C.R. 311, at ¶ 24-26, the court held that a police officer may enter a home without a warrant to respond to a distress call. The court distinguished *Feeney* where the purpose of entry was to make an arrest. There was no distress call from Ms. Silver's home. So *Godoy* is inapplicable, and the lawfulness of Cst. Hope's entry depends on the principles in *Feeney* and s. 529.3.

[27] The Crown accepts that there is implied consent that an officer may come to the door to knock, for the purpose of communicating with the occupant. See *R. v. Evans*, [1996] 1 S.C.R. 8, at ¶ 8, approving the statement in *R. v. Bushman* (1968), 4 C.R.N.S. 13 (B.C.C.A.) at p. 19; *R. v. LeClaire*, 2005 NSCA 165, leave to appeal denied [2006] S.C.C.A. No. 63 (Q.L.)

[28] There was no implied consent that Cst. Hope could cross the threshold of the Silver residence. As he had no warrant, the lawfulness of his entry to apprehend Ms. Silver depended upon the application of the common law hot pursuit doctrine or the existence of exigent circumstances under s. 529.3.

[29] In my view, this appeal may be determined by application of the hot pursuit principle. It is unnecessary to consider s. 529.3.

[30] The Crown acknowledged in the proceedings below and again at the hearing in the Court of Appeal that, if Cst. Hope lawfully arrested Ms. Silver without entering the home, then her subsequent apprehension was lawful. Ms. Silver's retreat would be an escape from lawful custody, contrary to s. 145(1)(a) of the *Code*, and Cst. Hope could lawfully follow her into the home in hot pursuit. I would add that, under *R. v. Macooh*, [1993] 2 S.C.R. 802, at ¶ 24, a hot pursuit must be a fresh and continuous pursuit such that the offence, pursuit and capture are a single transaction. Ms. Silver's alleged threat on the life of Ms. Glasgow had occurred some time before the events at the Silver residence. It cannot be said that the officers were in hot pursuit of Ms. Silver for that offence.

[31] To accomplish a lawful arrest, it is necessary that the officer have the subjective belief and objective grounds for an arrest, that he informs the individual of the arrest and that either he touches the individual or, if there is no touch, the individual submits to the constraint of arrest: *R.v. Asante-Mensah*, [2003] 2 S.C.R. 3, at ¶ 42-43, 45-47, 57, 80; *R. v. Latimer*, [1997] 1 S.C.R. 217 at ¶ 4.

[32] In *Feeney*, none of these conditions existed before the officers entered the trailer. In the present case, the trial judge found that, before reaching the Silver residence, the officers had the subjective belief and objective grounds for arrest, based on the information about the threat to Ms. Glasgow and Ms. Silver's background. At the doorstep, without entering, Cst. Hope twice informed Ms. Silver that she was under arrest. Ms. Silver did not submit to an arrest.

[33] Cst. Hope did not step into the residence before touching Ms. Silver. So the lawfulness of the arrest, and the outcome of the charge, turned on the esoteric point whether or not Cst. Hope's hand crossed the plane of the threshold before he touched Ms. Silver. That was an issue of fact. It was not an issue of law that was under appeal to the SCAC.

[34] If the trial judge had found that Cst. Hope reached into the residence to touch Ms. Silver, then a ruling that Cst. Hope was in "hot pursuit" would be an error of law. There would be no lawful custody from which Ms. Silver had escaped.

[35] But the trial judge did not find that Cst. Hope's hand had crossed the plane of the doorway. Rather, the trial judge said:

> [12] . . . Cst. Hope knocked again and Ms. Silver opened the door, and with her hand on the doorjamb asked, "What the f--k do you want?" . . . He felt he needed to arrest Ms. Silver to prevent a further commission of an offence by her, and so he advised Ms. Silver two times that she was under arrest and then touched her sleeve, whereupon Ms. Silver began her retreat into the residence, causing him to determine he would have to move from verbal to physical tactics to restrain Ms. Silver. Cst. Hope crossed the threshold to control Ms. Silver's movements ...

This is a finding that Cst. Hope touched Ms. Silver's sleeve while her hand was on the doorjamb. There was no finding that his hand entered the Silver residence.

[36] The SCAC judge said, on this point:

> [11] . . . Cst. Hope then told Ms. Silver she was under arrest, reached through the open door and placed his hands on her sleeve.
>
> . . .
>
> [43] . . . In fact, the trial judge did not make any specific finding as to where the arrest occurred.

[37] The Crown's factum to the Court of Appeal says:

> 54. On these facts, Cst. Hope had to pass his hand through the threshold of the open doorway and in doing so touched Miss Silver and completed the arrest **inside** the residence. [emphasis in Crown's factum]

The Crown's factum submits:

> **<u>The Summary Conviction Appeal Court properly identified an "unreasonable acquittal" and an Error of Law</u>**

. . .

> 72. It is submitted that Justice Pickup's decision is best understood as finding in fact that the verdict was "unreasonable" [or "cannot be supported by the evidence"] **and** has been based upon his implicit conclusion that the trial judge had not turned her mind to consider the proper test as to whether entry into the dwelling was "necessary to prevent **imminent** bodily harm or death to any person". [emphasis and brackets in Crown factum]

The Crown's reference to "imminent" harm relates to the analysis under s. 529.3(2)(b) of the *Code*, if the "hot pursuit" doctrine is inapplicable.

[38] With respect, the SCAC judge was not entitled to make or vary findings of fact, or to evaluate the evidence, or to rule that there was an "unreasonable acquittal", or to rule that the verdict was unsupported by the evidence. These factual and evidentiary matters were not appealed to the SCAC, as I discussed earlier. The trial judge did not find that Cst. Hope's hand crossed the plane of the Silver's doorway before touching Ms. Silver's sleeve. The SCAC judge was not mandated to re-evaluate evidence and substitute his finding that Cst. Hope "reached through the open door" before he touched Ms. Silver.

[39] I agree with the SCAC judge that "the trial judge did not make any specific finding as to where the arrest occurred." It is unclear whether or not Cst. Hope's hand crossed the plane of the Silver threshold to touch Ms. Silver's sleeve while her hand was on the doorjamb. The trial judge said "I am left in no doubt that the arrest was a lawful one". But there might have been an argument that the trial judge failed to make a finding on a fact that was essential to understand the reasons for her conclusion that the arrest was lawful. This would be a ground of appeal that the trial judge's reasons were insufficient under *Sheppard*. If such a ground of appeal succeeded, (and I make no comment whether it would), the appeal court could order a new trial or, in a clear case, undertake its own analysis of the evidence to resolve the ambiguity: *Sheppard*, at ¶ 55(10); *R. v. Braich*, [2002] 1 S.C.R. 903, at ¶ 41-42; *R. v. Lake*, 2005 NSCA 162, at ¶ 29.

[40] But there was no such ground of appeal before the SCAC. At the SCAC hearing, the Crown withdrew its ground of appeal respecting the sufficiency of the trial judge's reasons. So it was not open to SCAC to set aside the acquittal on what essentially would be a *Sheppard*/*Braich* ground of appeal.

[41] The trial judge ruled that the doorstep arrest was lawful. The SCAC identified no error in the trial judge's definition or application of the law on the issues that were appealed to the SCAC. In my respectful view, the SCAC erred in law by overturning that ruling. The Crown acknowledges that, if the doorstep arrest was lawful, Cst. Hope was entitled to enter the Silver residence in hot pursuit to apprehend Ms. Silver as an individual escaping lawful custody. So the apprehension in the home was lawful. Cst. Hope's defence under s. 25(1)(b) acquits him of common assault.

[42] It is unnecessary to deal with s. 529.3 of the *Code*. I express no view on the comments in the decisions of the courts below concerning that provision.

Conclusion

[43] I would grant leave to appeal and allow the appeal from the decision of the SCAC and reinstate the trial judge's acquittal of Cst. Hope on the charge of common assault.

Fichaud, J.A.

Concurred in:

Bateman, J.A.

Hamilton, J.A.