Cite as: R. v. Muise, 1992 NSCO 31

1991 C.Y. No. 6153

IN THE COUNTY COURT OF DISTRICT NUMBER THREE

BETWEEN:

ROBERT ARNOLD MUISE

APPELLANT

- and -

HER MAJESTY THE QUEEN

RESPONDENT

HEARD: At Yarmouth, Nova Scotia, on the 26th day of March, A.D. 1992

BEFORE: The Honourable Judge Charles E. Haliburton, J.C.C.

CHARGE: Section 90(1) of the Criminal Code

DECISION: The 30th day of April, A.D. 1992

COUNSEL: Paul B. Scovil, Esq., for the Appellant

Robert M. J. Prince, Esq., for the Respondent

D E C I S I O N O N A P P E A L

HALIBURTON, J.C.C.

The Accused has appealed his conviction which was entered the 23rd of July, 1991, by Phillip R. Woolaver, J.P.C. (now retired), on the charge:

> THAT on or about the 9th day of March, 1991, at or near Yarmouth, in the County of Yarmouth, Province of Nova Scotia, (he) did unlawfully have in his possession a prohibited weapon, to wit: a butterfly knife, contrary to Section 90(1) of the Criminal Code.

The circumstances which brought Mr. Muise before the Court are a little curious and may be briefly summarized. At about 10:15 on the evening in question, the Accused was a passenger in a motor vehicle which was stopped on the highway. The driver of the vehicle was arrested for impaired driving. R.C.M.P. Constable Bouchard was called to the scene by the arresting officer because there were two passengers in the vehicle and the arresting officer had determined to have the car towed away and impounded. When Constable Bouchard arrived, he "asked" the Accused and the other passenger to alight from the car. The Accused proved to be drunk and, as a result, was immediately placed under arrest "for being drunk in a public place". The Constable testified that he felt obliged to arrest Muise "because he wasn't in no condition just to leave him walk away. He was...very very intoxicated". As a standard procedure before placing him in the police car, the constable did a pat-down search and found in his pocket a "butterfly knife". This knife, according to the evidence, had a blade which opens by centrifugal force and is, therefore, by definition, a "prohibited weapon" as defined in s. 84(1)(b).

Under cross-examination, Constable Bouchard testified that Muise was not, in the result, charged with being drunk in a public place, but was charged with the present offence "because we always go by the most serious offence, which is prohibited weapon".

The Crown closed its case having presented the one witness, and Defence Counsel at the trial sought to have the evidence of the weapon excluded, arguing that the Charter rights (s. 8) of the Accused had been infringed. He argued that the arrest of the Accused was invalid and the search which could be justified only on the basis of the arrest, was therefore an unreasonable search. He pointed out that the Accused committed no offence until effectively ordered out of the motor vehicle by the police constable. If I follow the argument, it is that having been "ordered" by the police constable to commit the offence which caused his arrest, Muise should not be held criminally responsible for the discoveries made by the policeman as a consequence.

Defence Counsel raised a second issue relating to whether or not the knife in question had been proven to be a prohibited weapon.

After hearing the Crown with relation to the motion, Judge Woolaver gave his decision in the following terms:

> (Page 24)
> Thank you. It's my view that what took place was that the Officer was confronted with being present during the seizure of a motor vehicle. It's my view that he was within his right to ask any persons in the vehicle to get out of the vehicle. I'm satisfied that upon the Accused getting out of the vehicle, the Officer then

> determined that he was drunk and that it would be dangerous to leave him in the area and in my view, it was...it was proper from (sic) him to arrest him for being drunk in the position that he was after he got out of the vehicle. It's my view that the arrest was lawful. It's my view that it's totally reasonable for an officer to search drunken persons who he will be accompanying in a police vehicle. The Motion is denied.

When the Defence called no evidence, Judge Woolaver found the Accused guilty, saying:

> (Page 26)
> It's my view that the...the definition of possession is knowledge and control. This item was found on the person of the Accused. He clearly had knowledge and control of that item. It's my view that it falls four square within the definition of a prohibited weapon. I find that all the ingredients of the offence are present, adequately proven beyond a reasonable doubt.

The sentence he imposed was that the Accused pay a fine of Fifty ($50.00) Dollars.

THE ISSUES ON APPEAL

Counsel for the Appellant raises the following issues on appeal:

1) Was there a lawful arrest?

2) Was the search of the accused lawful?

3) Entrapment?

4) Should the result of the search be admitted into evidence?

To these issues, there was added a fifth issue at the time of argument, the fifth issue being whether or not it was established that the knife in question is a prohibited weapon.

FINDINGS

I will deal first with the question of the "weapon". Counsel have referred the Court to a number of cases including R. v. Walsh 107 N.S.R. (2d) 9; R. v. Roberts (1990) 99 N.S.R. (2d) 81; and Her Majesty The Queen v. Lisa Jean Neveau, an unreported decision of R. Brian Gibson, J.P.C., numbered 138283. In the context of these cases, it is argued on behalf of the Accused/Appellant that it was incumbent upon the Crown to prove the subjective intent of the Accused to possess a "weapon" as that term is defined in Section 2 of the Criminal Code. With greatest deference, I cannot take that meaning from the cases. Section 84(1), subparagraphs (a), (b), (c) and (d) describes specific implements or contrivances which are, by definition, "prohibited weapons". Under subparagraph (e), the Governor in Council is authorized, by executive order, to define other as yet unidentified instruments as "prohibited weapon(s)". It is this latter class of prohibited weapon created by "declaration" which has been the subject matter of the "subjective/objective" test which imports a consideration of whether or not the instrument meets the definition of "weapon" as set out in Section 2. I agree with what I understand to be the comments of Clark, D.C.J., when he said at page 338 - 339 of R. v. Kilpatrick 31 C.C.C. (3d) 344 (as quoted in Roberts):

> "Parliament has created two distinct categories of prohibited weapons under s. 82(1), namely, (i) certain specific devices, knives and firearms whose characteristics are spelled out in s. 82(1), definition "prohibited weapon", paras. (a), (b), (c) and (d), and

> (ii), a catch-all category found in para. (e) which comprises a weapon of any kind **declared by the order** of the Governor in Council to be prohibited weapons. Although **declared** to be a prohibited weapon, an "object" does not become one if it does not meet the definition of "weapon" as set out in s. 2 of the Criminal Code: see R. v. Murray, supra.
>
> The former category consists of absolute prohibitions. **The specific mens rea required to find liability flows from mere possession and is set in Archer and Phillips, supra. The evil that paras. (a), (b), (c) and (d) was designed to suppress was the possession of devices, knives or firearms which constitute a particular danger to the public...**
>
> **The latter category found in para. (e)** is different. It consists of "objects" which **must meet the threshold test of "weapon"...**
>
> (My emphasis)

There is thus no question of a subjective or objective test where an instrument or "weapon" falls squarely within the definitions provided in clauses (a), (b), (c) or (d) as is the case here.

What I have referred to as the fifth ground of appeal, or issue, as raised at the time of argument is without merit.

The remaining four issues will be dealt with as one. The concerns raised by the facts in this case are as much practical as legal. There is no suggestion that the police here were acting in bad faith in any way. The result of the search was apparently totally unanticipated. The evidence suggests that the police constable, in arresting the Accused, was as much motivated by his concern for the safety and wellbeing of the Accused in his drunken state as he was with enforcing any law, in this case, the Liquor Control Act. There is nothing to suggest that the pat-down search he did was anything other than

a perfunctory compliance with his operating instructions. As a result of the search, he located real evidence which existed entirely separate and apart from the conduct of the police constable which disclosed that the Accused, whether sitting in the car or standing on the pavement, was in breach of a specific, and well defined, criminal offence. He was committing an act which was prohibited on well founded and legitimate public protection grounds.

There is no question of "entrapment". Constable Bouchard neither encouraged nor enabled Muise to obtain and carry the prohibited weapon. If the policeman had, in fact, charged Muise with "being drunk in a public place", the theory of entrapment might arguably have had some merit, but here, the action of the Police Constable is entirely unrelated to the offence committed by the Accused. Indeed, the Accused was committing before he encountered the police constable.

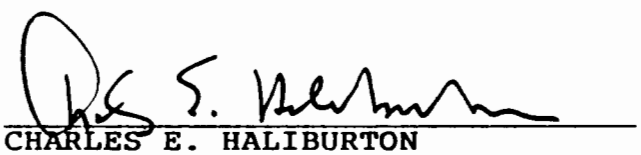
As a practical matter, how could the police constable have avoided arresting the Accused? He could not leave him in the motor vehicle which was about to be towed away. He could not leave him on the street because he was drunk. He could not place him in his police cruiser without searching him because of his own procedural orders. In order to take control of the Accused, it was, as a practical matter, necessary to arrest him. The Accused clearly was in technical breach of the Liquor Control Act and was subject to arrest. The arrest was lawful. The search was lawful. The results of the search were properly admitted into evidence.

CONCLUDING REMARK

While I have no dcubt about the guilt of the Accused, nonetheless, the circumstances would make the subject matter of an interesting philosophical debate as to whether or not prosecution in the circumstances is justified. Particularly so had the Accused simply faced the charge of "being drunk in a public place". Whether or not to proceed with any charge, however, is a matter for the discretion of the prosecutor. A charge under this section, if proceeded with by indictment, carries with it the possibility of imprisonment for a term of five years. I presume it was a reflection of these unusual circumstances that the Crown proceeded with it as a summary matter and Judge Woolaver, upon conviction, imposed a minimal fine.

The appeal is, accordingly, dismissed, and the conviction and sentence confirmed.

DATED at Digby, Nova Scotia, this 30th day of April, A.D. 1992.



CHARLES E. HALIBURTON
JUDGE OF THE COUNTY COURT
OF DISTRICT NUMBER THREE

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CASES AND STATUTES CITED:

R. v. Walsh 107 N.S.R. (2d) 9

R. v. Roberts (1990) 99 N.S.R. (2d) 81

Her Majesty The Queen v. Lisa Jean Neveau, unreported, No. 138283

R. v. Kilpatrick 31 C.C.C. (3d) 344