

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Cross, 2006 NSPC 22

Date: 2006/05/12
Docket: 1570575,
1570576, 1570577
Registry: Halifax

Her Majesty the Queen

v.

Robert Frederick Cross

DECISION

Judge: The Honourable Judge Castor H. Williams

Heard: May 12, 2006 (Trial date)

Written decision: May 23, 2006

Charge: Sections 344, 85(2)(a), 88(1) of the Criminal Code

Counsel: Christopher Morris for Her Majesty the Queen (Crown)
Luke Craggs, for the Robert Frederick Cross (Defence)

By the Court:

Introduction

[1] The accused, Robert Frederick Cross, stands charged that he on or about the 5th day of September 2005, at or near Halifax, did:

(a) unlawfully rob Haley Stevens and Cory Lake, contrary to Section 344 of the Criminal Code.

(b) AND FURTHER that he at the same time and place aforesaid, did use an imitation firearm while committing an indictable offence, contrary to Section 85(2)(a) of the Criminal Code.

(c) AND FURTHER that he at the same time and place aforesaid, did unlawfully have in his possession a weapon, to wit. , a lighter for a purpose dangerous to the public peace, contrary to Section 88(1) of the Criminal Code.

Summary of the Relevant Evidence

[2] It was just before midnight on September 5, 2005 and Haley Stevens and Cory Lake were at work at the Blockbuster on Quinpool Road in the Halifax Regional Municipality. Stevens, who was attending to the cash register saw the accused enter the store and place a duffel bag near the store's security sensors. Because of prior knowledge concerning him, she became suspicious and alerted Lake of his presence. Thereupon, Lake took and secured the duffel bag behind the store's counter and kept the accused under constant and continuous surveillance.

[3] Once the accused was about to leave the store, Lake, believing that he, the accused, might have stolen something although he did not see any such activity, went to the door to intercept him as he went through the security sensors. The sensors sounded an alarm as the accused passed, and Lake requested that he again go through and wanted to know whether the accused had on his person any store products. The accused denied that he had any. However, he then took from his pocket a cigarette lighter that had the shape of a palm-sized gun. He displayed the object in the palm of his hand and enquired whether it could have activated the alarm. Additionally, he stated that as a street person he needed it and, without being personal, would use it if he had to do so. Again he went through the security sensor and again it sounded an alarm.

[4] Desiring no confrontation with the accused after he again denied having any products on his person and fearing a possible situational escalation Lake directed him to leave the store. The accused requested the return of his duffel bag but when Lake refused to give it to him, he quietly departed without any further comments. Lake reported the incident to the police who soon after located and arrested the accused. Upon a search incidental to arrest the police did not find that the accused had any store products in his possession. However, in a voluntary statement to the police he allegedly reminded them that he was a thief and not a robber and what occurred was not a robbery.

Issues

[5] Here, the parties have raised the issues whether, in all the circumstances, it can be said, without any doubt, that the accused conduct constituted a robbery, using an imitation firearm to commit a robbery and the possession of a weapon for a purpose dangerous to the public peace.

Submissions of the Parties

[6] The Crown relies on the *Criminal Code* s.343 (c) that state:

Every one commits robbery who;

(c) assaults any person with intent to steal from him;

[7] In its submissions, the Crown presented several propositions as its theory of the case which were based mainly on the hypothesis that the accused conduct, in all the circumstances, constituted an assault. The Crown's principal position was that it need not prove that the accused committed a theft but merely that the accused assaulted the store clerks, Haley Stevens and Cory Lake. This alleged assault would have occurred to prevent them from resisting him either after the store alarm was activated and he showed them the weapon in his hand or that his very presence in the store, although they did not see him take or conceal any store products but merely acted suspiciously, historically, he was a subjective threat to the clerks and presented to them an "apprehension of imminent contact."

[8] Furthermore, according to this theory, the alleged assault also encompassed the accused actions as he was openly carrying a weapon or an imitation of a weapon and that he “accosted the clerks.” This, ostensibly, is based upon the evidence that the accused took from his pocket a cigarette lighter in the shape of a palm sized gun and displayed it, in his palm, to the clerk, in a nonthreatening manner and enquired whether it could have activated the store’s alarm. At that point in time he also stated to the clerk among other utterances that were neither aggressive nor demanding: “Am I going to have to use it?” In further addition, the Crown avers that the accused statement to the police, when first apprehended and in custody, that what occurred was a theft and not a robbery was self incriminating and cloaked him with knowledge of his own malfeasance.

[9] On the other hand, the theory on behalf of the accused was that no theft occurred, no violence occurred and that the clerks’ expressed subjective and prejudicial mind sets against the accused were not proof of any criminal wrong doing. True, the store’s alarm sounded. However, what actually caused it were mere irrational speculations and suspicions as there was no evidence that the accused took or concealed on his person, although under constant observation by the clerks, any store products. Likewise, soon after the incident, the accused was apprehended and arrested and the police did not find any store products in his possession.

Findings of Facts and Analysis

[10] On the evidence, I accept and find that the accused entered the store and placed his duffel bag that contained personal items and documents, in a location that caused the clerks to be suspicious. However, the clerk, Cory Lake, removed and secured it behind a counter. Likewise, I accept and find that the clerks knew the accused from prior contacts that caused them to view him with suspicion as he walked about the store. Also, I accept and find that because of their past experiences and beliefs about the accused the clerks had him under constant observation, practically at all times, when he moved around the store selecting and viewing products. I think that important and significant to the unfoldment of the events, and I accept and find, was that ,at no time did the clerks or any other patron inside the store see the accused take and conceal, on his person, or otherwise, any items.

[11] Additionally, I accept and find that as the accused was about to leave the store, Lake stood at the only public exit, and in front of him, as he approached to go through the security sensors. When the accused went through the security sensor it sounded an alarm and Lake requested that he again go through them. Lake also asked him whether he had on his person any store products. I accept and find that the accused replied that he had none. However, I accept and find that because the sensors sounded an alarm when the accused went through, in the circumstances, Lake's instinct was to refuse to accept the accused response as he honestly believed that the accused had something from the store concealed on his person.

[12] Here, I think that it is reasonable to conclude and I do conclude as it is in harmony with the preponderance of the probabilities that a practical and informed person would readily accept as reasonable in the set of circumstances that the clerks had an idea that they accepted as true based upon

their own past experiences with the accused. They believed that he was a thief and that belief governed their actions and reactions toward him. Moreover, this belief was carried to a logical conclusion regardless of whether the accused had actually done anything to support it. They felt that his mere presence in the store was intimidating and that he was up to no good so they kept a constant watch on his movements. Although they did not see him take any thing, they believed that he must have something in his possession particularly when he activated the sensor alarm and despite his denials and no empirical evidence to support their suspicions.

[13] However, notwithstanding the activated sensors and Lake's entreaties to leave any product that,

on suspicion, he might have on his person, the accused insisted that he had taken nothing. I accept and find that the accused then took from his pocket a lighter that was shaped as a palm-sized gun, held it flat in the palm of his hand, showed it to Lake and enquired whether this item could have caused the sensors to sound an alarm. Lake did not think so. I accept and find that the accused also said to Lake, when displaying the gun-shaped lighter, that he, the accused, lived on the streets and needed it. Further, that it was nothing personal but that he would use it if he had to. Desiring no confrontation, Lake asked him to leave but refused to return, upon the accused request, his duffel bag. I accept and find that the accused then left the premises without being aggressive, demanding or confrontational with Lake who had refused to return his bag, containing his personal property, to him.

[14] When the accused was arrested by the police, shortly after the reported incident, I accept and

find that, on a search incidental to arrest, the police did not find any items belonging to the store on his person or in the immediate area of his arrest. His utterances to the police, which the parties submitted were free and voluntary, I accept and find was to the effect that the police knew that he was a thief and not a robber. Likewise I accept and find that the police did not discuss with him any details of the incident at the store or whether he had taken anything from the store. Likewise, I find that there is no credible and reliable evidence that the accused confessed to any theft or actual wrongdoing in relation to the store.

[15] Further, I find and it is my opinion, that there is no credible, reliable or trustworthy evidence to support the crown's contention that the accused was openly carrying or wearing a weapon or imitation thereof and, accordingly that he accosted the clerks. In my opinion, it is clear from the evidence, and I find, that no one in the store saw, was aware of, or knew that the accused, as he walked about the store and looking at items, had a weapon or an imitation of a weapon on his person or even in his possession. Also, I find, on the evidence that I accept, that he had nothing visibly exposed or that there was even any suggestion or action on his part that would cause anyone present reasonably to believe, or to suspect, that he had on his person a weapon or any imitation of a weapon. I therefore find that he was not openly carrying or wearing a weapon or an imitation of a weapon and that the crown's contention to the contrary has no merit.

[16] Furthermore, I find that there is no evidence that he approached anyone, including Stevens, who was the cashier, and that he was speaking boldly, loudly or aggressively while demanding or requesting anything from anyone, or at all. The evidence was that Lake, in his belief concerning the accused, deliberately stood in front of the door, to intercept or to delay the accused as he was passing

through the sensors on his way out of the store. These individual acts, one of necessity and the other optional and voluntary, in my opinion, cannot rationally be interpreted to be that, in terms of the meaning of an “assault” as defined in the *Criminal Code*, s. 265 (c), the accused approached the clerk as envisaged by that section. Therefore, on the evidence that I accept, I do find that the crown has failed to prove beyond a reasonable doubt that the accused while openly wearing or carrying a weapon or an imitation thereof, which I have found that he was not, accosted anyone much less any of the clerks. Thus, I conclude and find that the accused did not assault any of the clerks within the meaning of the *Criminal Code*, s.265 (c).

[17] However, the inquiry does not end. The crown has asserted that when the accused displayed the palm sized gun-shaped cigarette lighter this action combined with his words clearly indicated that he intended to steal from the clerks. Put another way, the accused produced the imitation weapon to intimidate the clerks and to subdue any resistance that either or both of them might offer to prevent him from taking store property that Lake suspected that he had on his person. Thus, even if he did not actually steal anything, his conduct, by the production of the weapon and his words were sufficiently intimidating to engage the provisions of the *Criminal Code* s.343 (c).

[18] Respectfully, I have much difficulty with this engaging proposition. In my opinion, it presents analytically an underlay of extreme subjectivism that is superficial and distortive both in spirit and details. I think that the evidence is clear, and I accept and find, that it was after the accused had gone through the sensors for the first time and an alarm was sounded and he was asked to go through again, which he did without questioning, that he took the palm sized gun-shaped cigarette lighter from his pocket. I find, on the evidence that I accept, that he merely held it on display in the palm of his hand

in a nonthreatening manner and enquired whether it could have set off the alarm. He did not point it at anyone. He did not threaten any person with it. It was laying flat in the palm of his hand for the clerks to see.

[19] In my opinion, having heard and observed the witnesses as they testified and assessing their testimonies with the total evidence, I find that, in the context of what was happening, objectively, a reasonable and informed person could readily conclude, as it is in harmony with the probabilities of the existing set of circumstances, that the action of the accused can be considered and viewed as his way of trying to assuage Lake's suspicions that he had no store product in his possession, as was suspected. Again, contextually, and under the same parameters as above, I accept and find that to emphasize the point that his action was benign he indicated that, as a street person, he needed to have a deterrent for self-protection and would defend himself with it if he were forced to do so. That conduct, in my view, was not an intention to steal from the clerks or to overcome any resistance while attempting to steal from them. His duffel bag was behind the counter, he was leaving the store where no one saw him take or conceal anything on his person, and he was merely making an inquiry when he displayed, in a nonthreatening manner, the gun-shaped cigarette lighter to determine whether that was the cause of the alarm. He did not ask for or aggressively demanded anything from any person.

[20] True, the sensors sounded an alarm but, there was no evidence before me, other than the suspicions of the clerks, to persuade me beyond a reasonable doubt that the accused had in his possession any store products that could have activated the alarm. By way of example only, there was no evidence that the sensors were only activated by the store's product and by no other item, object or product. Or, by what mechanism and under what set of circumstances the alarm would sound. There

was a comment by Lake that other store products could activate the sensor's alarm. Likewise, again by way of example only, there was no evidence that after the store was closed following the incident the clerks took an inventory that showed any missing items and that those missing items were found on the accused when he was arrested. The evidence was that upon arrest the police did not find the accused with any store products in his possession. It therefore appears that the sensors, a mechanical device, is not, without some corroboration, a trustworthy and reliable probative fact that the accused took any store item. Thus, it is difficult for me to conclude, beyond a reasonable doubt, that the accused stole or intended to steal anything from the store.

[21] The police have also charged the accused with using an imitation firearm while he was committing an indictable offence. Although neither the imitation firearm nor the indictable offence is specified, the logical assumption is that this charge is somewhat related to the alleged robbery of the Blockbuster Store. The crown, by inference, in its argument has linked the two allegations. Assuming, however, that this offence is, in fact, linked to and is derivative of the robbery offence, logically if I find that no robbery did occur, then the logical conclusion would be that the crown has failed to prove beyond a reasonable doubt this particular offence. However, if this offence relates to some other indictable offence, other than the robbery allegation, there was no evidence before me of any such alleged indictable offence.

[22] With respect to the charge that the accused "did unlawfully have in his possession a weapon, to wit., a lighter for a purpose dangerous to the public peace," the relevant legislation is as follows:

s. 88 (1) Every one commits an offence who carries or possesses a weapon, an imitation of a weapon, a prohibited device or any ammunition or prohibited ammunition for a purpose dangerous to the public peace or for the purpose of committing an offence,

.....

s.2 “weapon” means any thing used, designed to be used or intended for use;
(a) in causing death or injury to any person
(b) for the purpose of threatening or intimidating any person
and, without restricting the generality of the foregoing, includes a firearm.

[23] Here, the accused is charged that he was in possession of a “ weapon,” a lighter, for a purpose dangerous to the public peace. Whether or not the lighter was a weapon depends on applying the facts, as I have found, to the definition as determined in s.2.

[24] On the evidence before and that which I accept, I conclude and find that the accused did not use the lighter to threaten or to intimidate anyone. He merely displayed it when the alarm was activated to ascertain whether it was the causative factor. I find that the clerks were ambivalent about their emotional reaction to this display but would appear not to be overly disconcerted. Thus, in my opinion, the lighter does not, in the circumstances, become a weapon within the meaning of the *Criminal Code*, s.2.

[25] Alternatively, even assuming that I did find that the lighter was a weapon, on the evidence that I accept, I find that when the accused displayed it, he did so to assuage the suspicions of Lake and for no other purpose. He took from his pocket something that he must have reasoned could have activated

the alarm. Further, it is reasonable to conclude, and I do conclude, that he was demonstrating that he had no hidden products. On the evidence that I accept, it is rational to conclude, and I do conclude, that the purpose for which the accused exposed his possession of the lighter was to see whether it activated the alarm and even so, he did not use it to threaten or to intimidate any person. What he said to Lake, in my opinion, was ambivalent and, as I have determined, could mean that he carried the object for his own safety. Thus, on the totality of the evidence before me and that which I accept, I conclude and find that the crown has not proved beyond a reasonable doubt that the accused had a weapon for a purpose dangerous to the public peace.

CONCLUSION

[26] However, on the evidence before me and that which I accept and on the above analysis I conclude and find that the crown has not proved beyond a reasonable doubt that:

- (a) the accused did rob Haley Stevens and Cory Lake;
- (b) the accused did use an imitation firearm to commit an indictable offence, and
- (c) the accused did have in his possession a weapon to wit., a lighter for a purpose dangerous to the public peace.

Accordingly, I find him not guilty as charged on all counts on the Information tried before me and will enter acquittals on the record.