

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Hofmeister, 2008 NSPC 46

Date: 20080410

Docket: 1796482

Registry: Kentville

Between:

Her Majesty the Queen

v.

Eugene Glenn Hofmeister

Judge: The Honourable Judge Alan T. Tufts

Heard: February 25, 2008, in Kentville, Nova Scotia

Written decision: May 30, 2008

Charge: 129(d) CC

Counsel: Bill Watts, for the Crown
Chris Manning, for the defence

By the Court (orally):

[1] The defendant is charged under s. 87(1) of the **Liquor Control Act** and s. 129(d) of the **Criminal Code**. The **Criminal Code** charge depends on the lawfulness of the arrest relative to the first charge. The issue in this proceeding concerns the meaning of “intoxication” under the **Liquor Control Act**; whether this defendant was in fact intoxicated, or in an intoxicated condition at the material times, or whether the police had reasonable grounds to conclude this and whether the police could lawfully arrest the defendant for that reason.

[2] The facts are not complicated. The defendant was at home on the evening in question and had friends over for a barbeque. He and his friends then went to the nearby Stoneroom Lounge in downtown Kentville. They appeared to have walked there. They then went to a pub called KAPS down the street from the lounge for more entertainment and dancing. The defendant was asked to leave the pub because he was dancing without his shoes on.

[3] The defendant said he had five bottles of beer at home, one at the Stoneroom and a gin and tonic at the pub. He testified that he was cheerful, but not intoxicated or drunk.

[4] When he was asked to leave the pub he tried to persuade the bouncers to allow him back in to notify his wife of his situation. They refused. This conversation was going on outside the pub and immediately across from the entrance to the downtown square, or Centre Square parking lot, where two police cars were pointing outward towards the pub, one officer in each car. The defendant went across the street in hopes that the police would intervene in his predicament. He spoke to the police—there was some dispute about what was said, however it is clear the defendant was not happy when the police refused to assist him. He was rude to the police at some point.

[5] He then left and walked east on Main Street. At this point the remaining portion of the events were captured on a video security camera. While the quality was not good it does capture the events clearly and one is easily able to discern who the various individuals are and what they were doing as seen on the video.

[6] The officers described the defendant as having a smell of alcohol, reddish eyes, and was rude and impertinent to the police. The defendant, however, does not

appear, in the video at least, to be staggering and no obvious signs of intoxication were present. He was speaking clearly to the police. They described no signs of significant impairment of his motor skills or his speech.

[7] As he walked away he either punched the side of the brick wall or gestured to that effect towards the adjacent building. At one point he walked back towards the police. He then went up to the crosswalk which goes north and south across Main Street back towards the pub. He pushed the button on the traffic lights and immediately crossed, turns around and returns to the north side of the street. This took approximately one minute. He then stood at the crosswalk on the north side for one minute, he walked towards the police and returned to stand at the crosswalk for another minute. As a red van approaches he crosses the crosswalk. He did not, in my opinion, interfere in the traffic and it does not appear that this van was required to stop quickly.

[8] When he got to the other side of the street the police decide that he should be arrested and move their vehicles across Main Street. One stopped on the south side of Main Street, the other went around the corner onto to Church Avenue. The police testified that they thought the defendant was “playing” with the traffic. At this point the defendant is returning back on the crosswalk to the north side of the street. As he does, both officers approach him from behind—one from the defendant’s right, the other from his left. Constable MacDonald was approaching from the defendant’s left. He testified he yelled out, “You’re under arrest”. Constable Blouin was saying, “Stop”. The defendant turned around briefly to look as he continued to get to the other side of the street. As he does the defendant took a couple of steps towards the east when he reached the sidewalk.

[9] At this point Constable Blouin grabbed the defendant by putting both of his arms around the defendant’s waist from behind and while the defendant is turning. Constable MacDonald moved in at the same time. The defendant started to go down and all three men go up against the plate glass window of the store in front of where this all happened and the window breaks.

[10] The defendant was struggling. It is not clear what exactly happened, however the defendant and Constable Blouin went briefly through the window, breaking it, and Constable MacDonald immediately pulled them back out and onto the sidewalk. There was a further struggle. At this point members of the public gathered, including a man who removed his shirt. The RCMP are seen driving by.

Constable Blouin was cut and attention was being paid to him as well as getting the defendant under control. The defendant was yelling, "I didn't do anything".

[11] At this point the red van, which the defendant had walked in front of, can be seen coming out of the parking lot where the police had been parked. This van then came onto Main Street and parked immediately adjacent to where the officers were still located. A man got out of the vehicle, renders assistance, and got in and out of the vehicle a number of times and took things from the back of his van. None of the two officers described who this was and what this man was doing. He was never called as a witness.

[12] The defendant was then taken across the street to get into Constable MacDonald's police car. It is clear in the video that the RCMP officer, who was driving by and had exited his vehicle and ran over to offer assistance, went with Constable MacDonald to put the defendant in the police car. Constable MacDonald was asked specifically whether this RCMP officer accompanied him to place the defendant in the car and he specifically denied this. Constable MacDonald was not correct in his recollection and this is clear, in my opinion, on the video security. Constable MacDonald said that the defendant refused to get into the police car and said that he resisted his efforts in that regard. He said it was only on his third attempt that he was able to get the defendant to get into the police car.

[13] Before dealing specifically with the issue of intoxication and whether the arrest was lawful I will make some findings of fact. The defendant was agitated and upset that he could not contact his wife and was frustrated with the police for their refusal to help him. Accordingly he was at times acting rude toward the police and became irritating to them and was deliberately acting, in my opinion, childish. However, he was not creating a disturbance nor was he being a nuisance. He was not interfering in traffic. He was not threatening violence. His actions were merely an immature attempt to display his disapproval of the situation he found himself in. Crossing the street was part of this display.

[14] When the officers approached him, one said "Stop". I strongly doubt that the other officer said, "You're under arrest". In any event the defendant did not hear this even if it was said given that both officers were talking at the same time. The defendant was not trying to evade the police, he was simply getting across the street before turning to speak to them. It is not clear why he turned briefly to the east on Main Street, but as I indicated I cannot conclude it was to avoid the police.

The defendant was never told he was under arrest until, as he testified, he was at the police car and wanted to know if he was under arrest before he got into the police car. I accept the defendant's testimony as to what occurred at the police car.

[15] The **Liquor Control Act**, s. 87, provides as follows:

87 (1) No person shall be in an intoxicated condition in a public place.

(2) Where an officer has reasonable and probable grounds to believe a person is in an intoxicated condition in a public place, the officer may, instead of charging the person under the Act, take the person into custody to be dealt with in accordance with this Section.

(3) A person taken into custody pursuant to this Section may be taken by the officer to any available treatment service, hostel or facility for care.

(4) A person arrested or taken into custody pursuant to this Section shall not be held in custody in a jail or lock-up for more than twenty-four hours after being arrested or taken into custody.

(5) A person taken by an officer to any treatment service, hostel or facility for care shall not be detained there for more than twenty-four hours after he was taken into custody unless the person consents to remain for a longer period.

(6) A person taken into custody pursuant to this Section may be released from custody at any time if

(a) the person in custody has recovered sufficient capacity that, if released, he is unlikely to cause injury to himself or be a danger, nuisance or a disturbance to others; or

(b) a person capable of doing so undertakes to take care of the person in custody upon his release. R.S., c. 260, s. 87.

[16] Subsection (1) was first enacted in 1930 as s. 75(2) of the **Nova Scotia Liquor Control Act**, S.N.S. 1930 c. 2, and at the same time as the temperance laws in Nova Scotia were repealed. This section has remained unchanged to today's date. In 1979 c. 26 of the Revised Statutes of Nova Scotia, 1978-79, the remaining subsections of s. 87 were added. The combined effect of all these

subsections is to make it an offence to be intoxicated in a public place, however this section gives police an alternative procedure to charging individuals with such an offence by taking them into custody essentially for their care or treatment.

[17] Section 111 of the **Liquor Control Act** provides that an officer can arrest any person who he finds committing an offence under this act. Section 4 of the **Summary Proceedings Act** creates a summary offence for wilfully contravening any enactment, and s. 7 of that same **Act** provides that the provisions of the **Criminal Code** apply *mutatis mutandi*. Accordingly, s. 495 of the **Criminal Code** applies to this arrest.

[18] Here the police simply said they were arresting the defendant for public intoxication, but did not confirm what authority they were exercising—either s. 87(2), s. 111 or the arrest provisions of the **Criminal Code**. The prosecutor today indicated s. 111 of the **Liquor Control Act**. In any event the issue is the same. Was the defendant intoxicated or in an intoxicated condition, as that term is used under the **Liquor Control Act**, or, for the purposes of s. 87(2), did the officer have reasonable grounds to conclude that he was intoxicated?

[19] Similar legislation is found in other provinces. In the Manitoba Court of Appeal¹, in a reference case to determine the validity of the legislation the Court found that the legislative purpose was to prevent intoxicated persons from being a danger to themselves or others and that the legislation was a valid exercise of provincial authority under s. 92(7) of the **Constitution Act of 1867**. The Court found it was only when it is manifest that a degree of intoxication has reached a state where the individual is dangerous to themselves or others or is a public nuisance, that the statute should be invoked. Intoxication, the Court found, is not a vague term. It is a readily determinable state of incapacity that has been given clear judicial interpretation. The term “intoxication” has been found to mean “the condition of being so stupefied or made drunk”. Just because certain amounts of alcohol have been consumed does not mean that a person is intoxicated. “Under the influence” does not mean intoxicated.

¹RE Intoxicated Person’s Detention Act 55 C.C.C. (2d) 130 (ManCA)

[20] In **R. v. Tisdale**², similar legislation was considered, except that the section provided for “in the opinion of the officer” an arrest could be made. The Court there found at p. 219:

“...he is not justified in relieving that person of his liberty merely because he appears to be under the influence of liquor. He must have clear evidence that the person has been stupefied by liquor. The question remains as to what degree of stupefication the person must have reached before a constable is justified in acting.”

[21] And later in the same paragraph the Court continues:

“...that he had lost the *capacity*, as distinct possibly from the inclination, to prevent himself from causing ‘injury to himself or be a danger, nuisance or disturbance to others’.”

[22] The term “intoxicated” must be interpreted consistently with the remaining subsections of 87 of the **Liquor Control Act**, in my opinion. If an individual can only remain in custody until he is no longer likely to cause injury to himself or be a danger or a nuisance or disturbance then he should not be arrested unless that condition exists, **R. v. Ward**³; for contrary view see **R. v. Venton**⁴.

[23] Section 87 is designed to apply in the alternative. The police cannot arrest under s. 87(2) and then charge under s. 87(1). See **R. v. Peterson**,⁵ for that proposition, that would tend to mean that the police must have used s. 111 or s. 495 of the **Criminal Code** in this particular case.

² [1971] 1 W.W.R. 215 (AlbMagCt); see also **R. v. Carruthers** [1978] A.J. No. 867; **R. v. Proulx** [1988] OJ No. 890; **R. v. Bechthold** [1991] A.J. No. 720; **R. v. Akerstrom** [2002] A.J. NO. 1243; **R. v. Haggerty** [2005] O.J. No. 5462

³ [2001] A.J. No. 1174 (AlbProvCt)

⁴ [2000] Y.J. No. 145

⁵ [2001] A.J. No. 479 (AlbQB); see also **R. v. Kelleher** [1995] NSJ No. 157 (NSSC) - taking an accused into custody does not preclude a charge under s. 111; and **R. v. Goyette**, unreported, Gibson, P.C.J. April 22, 1991; **R. v. Enslow** [1993] NSJ No. 590.

[24] Intoxication has been described as “extreme conditions of alcohol impairment”, see **R. v. James**⁶; for a contrary view see **R. v. E.B.K.**⁷ Even where an individual is swaying, has been drinking and is rude and uncooperative this does not mean the person is intoxicated—**R. v Schwalm**⁸. The effects of intoxication must be sufficiently substantial to allow the police to deprive an individual of his or her liberty, **R. v. Ward**, *supra*, and **R. v. Morris**.⁹ It means a person is unable to take care of him or herself or is a danger to other persons, see **R. v. Roberts**¹⁰

[25] In my opinion the term “intoxicated condition” means that a person must be in such a state or such a condition induced by alcohol that he or she is likely to cause themselves injury or be a danger or nuisance to others, see **R. v. Lively**¹¹ and **R. v. Morris**, *supra*. The degree of intoxication must be sufficiently substantial to deprive them of their liberty. The term “impairment” often used in drinking and driving cases is not an equivalent term to intoxication for these purposes. Impairment of the ability to operate a motor vehicle, for example, is far less than that required for intoxication under the **Liquor Control Act**.

[26] In **R. v. Morris**, *supra*, Judge O’Hearn gave a very good description of the purposes and objectives of the **Liquor Control Act** in arriving at similar conclusions to what I have today.

[27] As I indicated above the defendant was consuming alcohol and his behaviour may have been affected by the effects of alcohol on him, however he did

⁶ [1987] Y.J. No. 73; see *Rex v. Constable* 66 CCC 206 where intoxication is described as “stupefying with a drug or alcoholic liquor”; see also *R. v. Modeste* [1959] N.W.T. J. No. 1; *R. v. Carlick* [1987] Y.J. No. 77; *R. v. Hunter* [1992] Y.J. No. 27; *R. v. MacLeod* [1992] Y.J. No. 34; *R. v. Twiss* [1992] Y.J. No. 56; *R. v. Giri* [2001] O.J. No. 3307; see *R. v. McMurren* [2001] A.J. No. 1180 where “stupefication” was rejected; *R. v. Lyall* [2003] A.J. No. 588; *R. v. K.M.* [2004] O.J. No. 2724; *R. v. Grant* [2005] A.J. No. 762.

⁷ [2003] Yukon Cases (SC) 63

⁸ [2001] A.J. No. 704 (AlbProvCt)

⁹ [1979] N.S.J. No. 801 (NSCtCo); see also *R. v. Merasty* [1988] S.J. No. 668.

¹⁰ 2003 SKPC 75 (SaskProvCt)

¹¹ [2007] N.S.J. No. 431 NSSC

not display any signs which could or would give the officer any reasonable basis for concluding that he was in an intoxicated state, in my opinion. He was not in any condition which objectively could be considered to be in a state where he was a danger to himself or others. He was not causing a nuisance or disturbance to a point where his liberty needed to be restricted. He was not interfering with the traffic and it was not reasonable to conclude that he had any potential for violence and it was not reasonable to conclude that he was being a nuisance to the traffic, for that matter.

[28] Accordingly, the officer could not have reasonably concluded that he was probably in an intoxicated state. He could not have been arrested under s. 87(2) of the **Liquor Control Act**. Furthermore, he was not, in my opinion, in an intoxicated state as that term is defined above. He was not found to be committing an offence, therefore under the **Liquor Control Act** the police had no authority to arrest him under s. 111 of the **Liquor Control Act** or under s. 495 of the **Criminal Code**.

[29] Finally, if I am wrong on any of the above, in my opinion Constable Blouin used excessive force when he placed his arms around the defendant from behind. At that point the defendant was not a risk to the safety of the officer and he was simply walking to the other side of the street. He was not avoiding the police. In these circumstances the officer, if he had any legal authority to effect an arrest, should have approached the defendant, placed his hand on the defendant and clearly announced that he, that is the defendant, was under arrest. He did not do this. The arrest was unlawful.

[30] I recognize that police officers have a very difficult job and that decisions to intervene or arrest someone is often required to be made quickly and without the luxury of a lot of pondering or forethought, given the dynamics of street police work. However, in this case there was simply no grounds to reasonably conclude that this man was intoxicated as I described above, and while I acknowledge the defendant was acting in an immature manner and perhaps annoying the police, this was not grounds for his arrest.

[31] Accordingly, the defendant was not resisting the officer in his lawful execution of his duty. I might add that even if he was arrested before the window broke I am not convinced he was resisting, given the aggressive manoeuvre of Constable Blouin, and he did get into the car when it was finally explained to him that he was under arrest.

[32] Accordingly, he is found not guilty under s. 129 of the **Criminal Code**. Because he was not intoxicated he is also found not guilty under s. 87(1) of the **Liquor Control Act**.

Alan T. Tufts, J.P.C.