

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Barr, 2009 NSPC 27

Date: July 2, 2009

Docket: 1889332

Registry: Shubenacadie

Her Majesty the Queen

v.

Gregory Allen Barr

DECISION

Judge: The Honourable Judge Anne S. Derrick

Heard: June 15, 2009 in Shubenacadie Provincial Court

Decision: July 2, 2009

Charges: *Criminal Code* section 434.1

Counsel: Jillian Ryan - Crown
Chrystal MacAulay - Defence

By the Court:

Introduction

[1] Gregory Barr is charged with intentionally causing a fire to a Saturn car, owned by him, “which fire seriously threatened the safety of Constable Daniel Pottie contrary to section 434.1 of the **Criminal Code.**”

[2] Mr. Barr’s trial proceeded on the basis of an agreed statement of facts and the evidence of two Crown witnesses, Cst. Lana Bernard and Cst. Pottie. The Defence called no evidence.

[3] The agreed facts were read into the record. They provide a factual background and satisfy the requirement of proof on most of the elements of the offence.

The Agreed Facts

[4] Cst. Lana Bernard was fueling her police cruiser at Miller’s Gas Station in Shubenacadie around 8 p.m. on March 1, 2008. She was alerted by a male attendant at the gas station about a man who had got out of a red car that was parked across the street and run away. Cst. Bernard notified the Enfield Detachment of the RCMP and waited at the scene for Cst. Pottie to arrive. At the time Cst. Bernard was assigned to the Indian Brook RCMP detachment. Cst. Pottie worked out of the Enfield Detachment.

[5] Csts. Pottie and Bernard investigated the red car. As a consequence of doing so, they called the local Fire Department due to a fire in the vehicle. Their investigative efforts also involved following a pair of tracks that led into a garage at the side of the gas station but they then lost the tracks due to the snow that was coming down. They also looked up the VIN for the car and discovered that it was registered to a Jeff Lightle. Sgt. Bushell of the Enfield RCMP went to Mr. Lightle's residence to speak to Mr. Lightle and learned from him that he had sold the car approximately a week earlier. Mr. Lightle had listed the car on Kijiji and sold it for \$100 cash. He did not know the name of the purchaser but was able to give a physical description of the person.

[6] At about the same time, Cst. Bernard observed a man walking by Miller's Gas Station who matched the description provided by Mr. Lightle. She stopped the individual and requested that he identify himself, which he did. He told Cst. Bernard his name was Gregory Barr.

[7] Mr. Barr's name was given to Sgt. Bushell and a photograph of him was obtained from the Detachment. Mr. Lightle was shown the photograph and positively identified the person in the photograph as the person to whom he had sold the car.

[8] Mr. Barr was arrested and taken to the Enfield Detachment where he gave a Chartered and cautioned statement. In that statement, Mr. Barr told police that the red car had broken down. He lit the bottom of the seat on fire but then had a moment of conscience and tried to extinguish the fire with a rag. Mr. Barr said he felt the flame was out and left the car, which was full of smoke.

[9] Mr. Barr told police that subsequently he walked back to the scene to get lottery tickets. He admitted that he had purchased the car from Jeff Lightle.

The Car

[10] The car purchased by Mr. Barr from Mr. Lightle was a 1997 Saturn, a four door sedan. Mr. Barr abandoned it across from the gas station in the southbound lane of Main Street in Shubenacadie. When Csts. Bernard and Pottie approached the car they thought it had tinted windows because the windows appeared to be darkened. As it turned out, this was because of soot caused by the fire set by Mr. Barr. Cst. Pottie observed stains on the interior of the car that had the same consistency and smell as motor oil. The centre console, the passenger seat and the rear seat all had this oily substance on them. A bottle of Napa brand premium performance motor oil was located in the car on the front passenger seat. The bottle had a rag stuffed in its neck and its cap was never located.

[11] Police photographs taken of the inside of the car show where the underside and front portion of the front passenger seat had been burned. The area was quite badly charred although the front passenger side door, while smoke damaged, was not burned. The windows were obviously sooty but there were no other burned areas in the car's interior. The glove box directly in front of the charred passenger seat was not burned although it did suffer soot and smoke damage. Snow accumulated on the car's roof had not melted by the time the car was photographed by police in a storage garage.

Other Facts

[12] There is no dispute that the weather on the evening of March 1, 2008 was miserable. Cst. Pottie described it as a combination of snow, thick sleet, heavy rain and slush that made driving “treacherous.” The bad conditions made it impossible for Csts. Bernard and Pottie to follow the tracks in the snow.

[13] Csts. Bernard and Pottie tried following the tracks in the snow in order to locate the man who ran from the red car. Failing to find him, they turned their attention to the car. Neither Csts. Pottie nor Bernard suggested in their evidence that they suspected a fire in the car. When Cst. Pottie approached the red Saturn, there was no smoke escaping from it. He was able to open the driver’s door but when he did, a thick cloud of black smoke billowed out. Cst. Pottie described the smoke as having a strong, noxious chemical smell. He quickly closed the car door and took a couple of steps back.

[14] In the fleeting moment that Cst. Pottie had the driver’s door open, he testified that he saw a red glow. He was unable to tell whether what he saw was something smoldering or an actual flame. He described what he saw in a police occurrence report as “smoldering.” Cst. Pottie hastily closed the door because he feared that oxygen would feed whatever was burning.

[15] Cst. Pottie testified he called the Fire Department and that they attended quite quickly. They did not use any water or spray anything inside the vehicle. This is evident from the photographs. Cst. Pottie agreed that whatever had been burning

inside the vehicle had gone out on its own. Presumably if it had not, the Fire Department would have had to douse it.

[16] Cst. Pottie was not injured by the smoke and did not come into contact with any flame. He neither sought nor received any medical treatment. He testified that he jumped back from the car as he closed the door because he feared injury. It was however not the smoke that worried him so much as the fact that the oxygen entering the car could ignite a bigger fire.

Analysis

[17] Mr. Barr is presumed innocent until proven guilty beyond a reasonable doubt and the burden on the Crown to prove each element of the offence beyond a reasonable doubt does not shift at any point in the trial. It remains a burden on the Crown throughout.

[18] This case boils down to the issue of whether the Crown has proven beyond a reasonable doubt that the fire set by Mr. Barr to the upholstery of the passenger seat in the red Saturn “seriously threatened the safety” of Cst. Pottie. Other elements of the offence with which Mr. Barr has been charged - his ownership of the vehicle and the intentional setting of the fire - have been admitted. Jurisdiction and identity are not in issue.

[19] I must examine the issue of how serious a fire was burning inside the Saturn when Cst. Pottie opened the door. I have concluded on the evidence that the fire was

not very serious even though it produced some nasty smoke and sooted up the windows and the interior door panels and dashboard. There is no evidence of any flames. The smoke created by Mr. Barr lighting the upholstery, although escaping in a black, acrid cloud when Cst. Pottie opened the car door, was not leaking out from the car beforehand. The Fire Department did not have to apply anything to extinguish the fire, neither water nor flame-retardant chemicals. Mr. Barr had tried to extinguish the fire right after he lit it, and believed he had been successful. The degree of burning inside the car did not cause the door handle to be too hot to touch. Cst. Pottie did not testify that the door handle registered any heat at all. He closed the door quickly because of what he saw after he opened it. I am satisfied that what Cst. Pottie saw was smoldering, not flame. This was how he described his observations in his police occurrence report.

[20] Cst. Pottie was asked to describe his perception of the incident with a question about the seriousness of the call he received that night. He rated the call as a “seven and a half or an eight” out of a possible ten. He agreed that the particular circumstances of a call determine its seriousness. A fire in a car could potentially be a very serious incident for police responders. Fire is unpredictable and a car offers plenty of combustibles that could make a fire very dangerous. However, for Mr. Barr to be convicted, the fire in the Saturn must have “seriously threatened the safety” of Cst. Pottie. Did it?

[21] It is helpful to examine the definitions of the words used in the charge against Mr. Barr. Threaten, according to the Oxford English Reference Dictionary, means: “constitute a threat to; be likely to harm; put into danger.” Safety is defined as: “the

condition of being safe; freedom from danger or risks.” Serious and seriously are defined respectively as: “not slight or negligible” and “to a serious extent.”

[22] These definitions, and common sense satisfy me that the fire lit by Mr. Barr had to have actually jeopardized or risked Cst. Pottie’s safety in order for Mr. Barr to be guilty of this serious, indictable offence. As I previously described, the fire was a minor one, dying out of its own accord, without any intervention. While Cst. Pottie’s quick thinking may have prevented it from getting an oxygen boost, the fact is that even with the influx of air through the briefly opened door, the fire did not flare up into flames. It did no more than produce a foul black cloud of smoke. The fact that the Fire Department was called does not establish that the fire was serious. (*R. v. O’Brien*, [2002] T.J. No. 61 (Y.T.C.))

[23] I accept that a serious threat to Cst. Pottie’s safety does not have to involve actual injury. In any event, there were no injuries here of any kind. The offence under section 434.1 is made out if safety is placed in serious jeopardy. No physical harm has to be caused. And while I suppose it is fair to say that any fire lit in a car has the *potential* to be a serious threat, the charge against Mr. Barr requires that this fire must have constituted an actual and serious threat to Cst. Pottie’s safety.

[24] The serious threat to Cst. Pottie’s safety must be proven by the Crown beyond a reasonable doubt. I am not satisfied that this standard of proof has been met by the facts of this case. This was a negligible fire that created a sooty residue inside the car and a noxious black cloud of smoke. The car was already full of smoke when Mr. Barr left it. The fire was not burning when the Fire Department attended, which they did

quite quickly. Not much time elapsed between the fire being lit, Cst. Pottie opening the car door, and the Fire Department arriving. The fire died in that time. Cst. Pottie was never in any danger from this fire.

[25] Police officers face real danger in their work and I would not be surprised if Cst. Pottie has confronted serious threats to his safety in the course of over twenty years as a police officer. In my opinion however, this fire did not seriously threaten his safety. That is not to say that the events of March 1, 2008 were inconsequential. They required investigation by the police and fire services when weather conditions made being outside unpleasant and potentially hazardous.

[26] I heard no evidence as to Mr. Barr's motives for setting the fire. I do not know what he was thinking. He was not using sound, responsible judgment whatever he was thinking. Although the agreed facts establish that Mr. Barr had a change of heart and put out the fire, or at least believed he had done so, at the time he lit the fire he evidently gave no thought to the consequences that could follow. As it was, Cst Pottie had to come out on a miserable night and deal with a car filled with smoke. Cst. Pottie appropriately determined that the possible presence of fire required the attendance of the Fire Department. These vital police and fire services, making their way to the scene in bad weather, could have had an accident. They did not, although Cst. Pottie noted in his evidence that the driving was treacherous. Attending at this call could have diverted the police officers and fire fighters from a more urgent matter elsewhere.

[27] Such potential consequences do not engage the criminal law in this case. It is

not Mr. Barr's poor judgment or lack of social responsibility that I must assess: what I am required to determine is whether the Crown has proven beyond a reasonable doubt that the fire in the car "seriously threatened the safety" of Cst. Pottie. I am not satisfied that it did. Consequently I am acquitting Mr. Barr of the charge. I am sure Mr. Barr will greet this result with relief, but he should not be feeling self-satisfied. I can only say I hope he has learned something valuable from his experience before the courts in this case and has resolved to act in a more responsible and intelligent fashion in the future.

Anne S. Derrick

Judge of the Provincial Court of Nova Scotia