

**PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** R. v. Thompson, 2009 NSPC 51

**Date:** October 6, 2009

**Docket:** 1974490

**Registry:** New Glasgow

**Between:**

Her Majesty the Queen

v.

Lonnie Leon Thompson

**Judge:** The Honourable Judge Theodore K. Tax

**Heard:** August 24, 2009 in New Glasgow, Nova Scotia  
And September 14, 2009 in Pictou, Nova Scotia

**Written decision:** October 6, 2009

**Charges:** Section 348(1)(a)CC

**Counsel:** Jody McNeill, for the Crown  
Stephen Robertson, for the Defence

**(Orally)**

[1] Mr. Lonnie Thompson stands charged that on or about October 2, 2008, at or near River John, Nova Scotia did break and enter a dwelling house situated at 1973 Highway number 6, River John, Nova Scotia, with intent to commit an indictable offence therein contrary to section 348(1)(a) of the **Criminal Code**.

**The Evidence**

[2] Constable Troy Murray of the Royal Canadian Mounted Police stated that he was on duty on October 2, 2008 between 1 AM and 1:30 AM. At that time he was a passenger in a police car going east on Hwy. #6 when they turned left onto the Cape John Road, in River John, Nova Scotia. Constable Bryce Haight was driving the police car. As they passed Ms. Mae Fan Yap's service station, Constable Murray noticed a truck at the side of the station facing Ms. Yap's residence. The truck had not been there 30 minutes earlier when they drove by.

[3] Constable Murray saw a male standing close to the passenger door wearing a hoodie that was up. That male opened the truck door and got in the truck. He also saw another individual at the door to Ms. Yap's house and that door was open. Constable Murray said that he only caught a "glimpse" of the person at the door, because most of his attention was focused on the person standing by the truck.

[4] After turning left and driving down Cape John Road a short distance, Constable

Murray asked Constable Haight to turn the car around and go back to Ms. Yap's residence. According to Constable Murray, it took them a few seconds to a minute or two to return to Ms. Yap's residence. When they returned, Constable Murray saw an individual standing at the bottom of Ms. Yap's stairs, and as they pulled in, that individual ran off. That person ran for 30 or 40 feet before falling. Constable Murray heard bottles hitting each other as the person fell. The person who ran away was later identified as Lonnie Thompson.

[5] On cross examination, Constable Murray acknowledged that where the truck was parked at the side of Ms. Yap's service station, it was out of the light and not highly visible from the road. In addition, he also acknowledged that when they turned the corner and went up the Cape John Road, the truck and the people were out of sight until they turned around and came back to Ms. Yap's house. He confirmed that the period of time involved between several seconds to one or two minutes.

[6] Constable Haight testified that he was driving his police car with Constable Murray around 1:30 AM on October 2, 2008 when they came to the Corner of Hwy. #6 and the Cape John Road, in River John. He saw an individual standing near a truck parked near the service station who was approximately 6 feet tall in his early 20's. Cst. Haight said that he later identified that individual as Brayden Wulf. Constable Haight also saw a second person inside the residence by 1 or 2 feet with the door open. The officer was

approximately 60 feet away driving the police car at a slow rate of speed when he made these observations.

[7] With respect to the person in the door on the porch of Ms. Yap's house, the officer said that he noticed the individual take long looks at the RCMP officer, and then take a half step back and slowly shut the door. He described this person as being in his mid-20s with a receding hairline.

[8] Constable Haight drove down the road a short distance, turned around and returned to Ms. Yap's house within 15 to 20 seconds. As they drove up, the individual by the house took off running and Constable Murray pursued him. He estimated that the person who ran away was about 10 feet from the doorstep when he took off. Constable Haight testified that the person who stayed by the truck was later arrested and identified as Brayden Wulf.

[9] Constable Haight was of the opinion that Lonnie Thompson was highly intoxicated. On cross examination, he could not recall what clothes the individual at Ms. Yap's door was wearing.

[10] Ms. Mae Fan Yap testified that she owned the service station, restaurant and lived in the house located behind the service station at the Corner of Hwy. #6 and the Cape John Road, in River John, Nova Scotia. She confirmed that the gas station's regular business hours are from 7 AM to 9:00 or 10 PM, throughout the year and they have been

the same for approximately 30 years. It is only in the rarest of cases, usually at the request of the police, that she opens the station after-hours. Ms. Yap testified that when the station is closed, all of the lights are turned out except for a couple of lights in the store.

[11] Ms. Yap said that she has known Lonnie Thompson and Brayden Wulf, as customers for a long time, but that she has never given either of them permission to be in her house. She has never invited either one of them into the house.

[12] Ms. Yap said that she only heard one knock on her door shortly after 1:00 AM on October 2, 2008 when an RCMP police officer woke her. She confirmed that the door on the side of her house closest to the service station and restaurant is a porch door where freezers used by the restaurant and wood for her fireplace are located. That door is always left unlocked.

[13] Mr. Brayden Wulf and Mr. Lonnie Thompson testified for the defence. Mr. Wulf said that he was driving his newly acquired pickup truck between 1 and 2 AM on October 2, 2008. Mr. Thompson was the only other person in his truck. Since the gas gauge was on empty, and he was not sure that he had enough gas to get back to his house, Mr. Wulf formulated the idea that he would stop at Ms. Yap's house, try to wake her up and ask her to sell him \$20 of gas.

[14] Mr. Wulf parked his truck on the side of the service station facing Ms. Yap's house

and went on to the porch to knock on the door. He knocked a few times but heard no answer or any barks from a dog in the house. He left the porch and walked off the steps and stood by his truck when the police arrived at the scene and arrested him.

[15] Mr. Wulf testified that Mr. Lonnie Thompson never went to the porch, and although Mr. Thompson was outside of the truck at a certain point, he stayed between 10-20 feet away from the house at all times. Mr. Wulf confirmed that he was the only one who went into the porch of Ms. Yap's house. Moreover, he acknowledged that he pled guilty to the charge of unlawful entry into a dwelling house contrary to section 349(1) of the Criminal Code and had been sentenced.

[16] Mr. Wulf acknowledged that he was intoxicated at the time having consumed between 12 and 15 bottles of beer over a six-hour period that evening. When asked about the beer in the bag that was located beside Mr. Thompson when he fell, Mr. Wulf stated that the beer was purchased at the Nova Scotia Liquor Commission.

[17] Mr. Lonnie Thompson testified that he was a passenger in Mr. Wulf's truck, and that sometime between 1:30 and 2 AM on October 2, 2008, when they ran out of gas. He confirmed that both he and Mr. Wulf had been drinking and that Mr. Wulf decided to go to Ms. Yap's porch to knock on the door. Mr. Thompson stood outside the passenger side of the truck to stretch.

[18] In terms of the clothes they were wearing, Mr. Thompson stated that both he and

Mr. Wulf were both wearing the same brown colored jacket, and that each of them had a hoodie on and up because it was cool that evening.

[19] When the police car returned after driving by the first time, Mr. Thompson went into the truck and got a bag of loose bottles of beer from the passenger side and then he ran off. He explained that he did not want the police to confiscate his beer as they had done four days before this incident and on other occasions. Mr. Thompson could not estimate how far the truck was from Ms. Yap's house, but he indicated that it was parked beside the propane tank and concrete pylon at the side of the service station.

[20] Mr. Thompson testified that he drank 12 bottles of beer and a half quart of rum that evening. He did acknowledge that he was intoxicated, and also admitted that he was intoxicated in a public place. Mr. Thompson was not sure how much Mr. Wulf had to drink and stated that he was with Mr. Wulf after 11 PM on October 1, 2008, as a passenger in Mr. Wulf's truck.

**Submissions of Counsel:**

[21] In terms of the essential elements of the offense, the Defence does not take issue with the date, time, jurisdiction, location of the place broken into and, the ownership of that dwelling house. Since the owner gave no evidence of anything actually being stolen from her residence, the Crown relies on the presumption contained in section 348(2)(a) of the Criminal Code to establish the intent element. The accused person and his friend,

Mr. Brayden Wulf, took the stand to tender evidence to rebut that presumption.

[22] The Defence submissions are twofold: (1) they maintain that the identity of the accused person as the individual who entered Ms. Yap's house is an issue and (2) they maintain that the Defence evidence regarding the actual intentions of Mr. Wulf and Mr. Thompson should be accepted and that their evidence rebuts the presumption contained in section 348(2)(a) of the Code. Defence counsel acknowledges that it was Mr. Thompson who ran away when Constable Murray approached him and subsequently arrested him. However, the Defence maintains that they have provided a credible explanation to rebut any adverse inference that may be drawn from the circumstantial evidence of Mr. Thompson attempting to flee the scene.

[23] The Crown's position is that both officers are 100% certain that it was Mr. Thompson who was the person who entered Ms. Yap's house. In addition to the officers' identification evidence, the Crown relies on the fact that Mr. Thompson ran away when the police came back to Ms. Yap's house to investigate. The Crown suggests that this amounts to "consciousness of guilt" which supports their theory of the case. In response to the Defence evidence regarding the actual intentions of Mr. Thompson and Mr. Wulf which were tendered to rebuts the section 348(2)(a) Code presumption, the Crown says that their evidence is not credible.

### **Analysis**



[24] In any case involving an accusation that someone has committed an offence under section 348(1)(a) of the Criminal Code, the first point to note is that there is no known offence of simply "breaking and entering." The substantive charge in section 348(1) of the Criminal Code states that an essential element of the offence is the requirement that either the break and enter was done with intent to commit an indictable offence or there was a break and enter and an indictable offence was committed.

[25] In subsection 348(2) of the Code, Parliament has inserted a statutory presumption of intent if there is evidence that accused broke and entered into a place or attempted to do so. Subsection 348(2)(a) provides as follows:

"For the purposes of proceedings under this section, evidence that an accused

(a) broke and entered a place or attempted to break and enter a place is, in the absence of evidence to the contrary, proof that he broke and entered the place or attempted to do so, as the case may be, with intent to commit an indictable offence therein."

[26] Although there is a statutory presumption, the accused person may rebut that presumption by presenting "evidence to the contrary" through either Crown or Defence witnesses.

[27] In **R. V. Proudlock**, [1979] 1 SCR 525, the Supreme Court of Canada reviewed the statutory presumption found in section 348(2) of the Code and interpreted the words

"in the absence of evidence to the contrary." The court held that an accused person need only adduce evidence that may be reasonably true in order to raise a reasonable doubt. The accused does not have to "establish" a defence on a balance of probabilities. The court noted the burden of proof does not shift to the accused person. However, if the trial judge completely disbelieves the evidence of the accused, as he did in the **Proudlock** case, then, there would be no evidence to the contrary.

[28] As a result, this case requires an assessment of the credibility of testimony which I accept, taken in the context of all of the evidence adduced at trial, including circumstantial evidence, to determine whether I am convinced beyond a reasonable doubt of the guilt of the accused person. In considering the evidence adduced at trial, I may believe all, some or none of the evidence of a witness or accept parts of the witnesses evidence and reject other parts.

[29] There are many tools for assessing credibility of testimony there is the ability to consider inconsistencies or weaknesses in the evidence of witnesses, including internal inconsistencies, prior inconsistent statements and external inconsistencies. Second, I can assess the attitude and demeanor of the witness, for example, were they evasive, sincere or belligerent and also assess their ability to observe and recall events in responding to questions. Third, I can assess whether the witness has a motive to fabricate evidence or to mislead the court, but I disregard this factor if an accused person testifies as it affects

every accused in an obvious way. Finally, I can consider the overall sense of the evidence and when common sense is applied to the testimony, whether it suggests that the evidence is impossible or highly improbable.

[30] In assessing the credibility of the evidence adduced at trial, I note that there were no material inconsistencies between the testimony of Mr. Wulf and that of Mr. Thompson relating to the fact that it was Mr. Thompson who was standing by the passenger side of the truck wearing a hoodie with the hood up. In fact, the presence of a male passenger standing at the side of the truck was supported by Constable Murray in his testimony. Moreover, Constable Murray also supported the defense evidence by saying that he noticed the person on the passenger side had a hoodie which was up. Constable Murray also testified that the person he chased for 30 or 40 feet, later identified as Mr. Thompson, was carrying a grocery bag of beer bottles. That fact is consistent with Mr. Thompson's evidence that he took off with a grocery bag full of loose beer bottles.

[31] Constable Haight testified that when the police came back to Ms. Yap's residence, after their first drive-by, he noticed that the person who ran away when they approached was about 10 feet from Ms. Yap's doorstep. This is consistent with and supports Mr. Wulf's estimate of where Mr. Thompson was standing when he ran away from the police officers.

[32] There was no evidence adduced by Ms. Yap or the police that any articles were

actually stolen from her house or her porch. This is supportive of the fact that the beer bottles were not taken from Ms. Yap's residence. The uncontradicted evidence is that, at some point, Mr. Thompson took the bag with the beer bottles from the passenger side of the truck. I also note that neither police officer said the person who was inside the door to Ms. Yap's porch was carrying a bag.

[33] While there could be partiality due to the long-standing friendship between Mr. Wulf and Mr. Thompson, I find that Mr. Wulf did not try to paint himself in the best possible light. In fact, he freely admitted that he was intoxicated and that it was his idea to try to buy gas by knocking on Ms. Yap's door and ask her to open the service station after hours. I find that these were not statements made with any intent to fabricate evidence or to mislead the court by deflecting potential culpability for the offense from his friend to himself. In fact, these statements were clearly not made in his self-interest and I find them to be forthright and candid.

[34] Moreover, Mr. Wulf acknowledged his legal responsibility for the unlawful entry into Ms. Yap's house, entered a guilty plea with the assistance of counsel and was sentenced. The police officers said that they only saw one person at or inside Ms. Yap's door, and Mr. Wulf's testimony in this trial and his guilty plea are entirely consistent with that fact. Mr. Wulf acknowledged that he was the only person who had been inside Ms. Yap's porch.

[35] While both Mr. Wulf and Mr. Thompson acknowledged that they were intoxicated during the early morning hours of October 2, 2008, I find that neither one's ability to observe and recall events appeared to be affected. Their answers to questions posed by counsel were not evasive, they recalled the events and responded in a forthright manner. I find that neither one downplayed the amount of alcohol that they had consumed, nor did they seek to present themselves in the best possible light.

[36] Finally, looking at the overall sense of all of this evidence, I find that it is highly probable that Mr. Wulf, as the owner and driver of the truck, would come up with a plan, albeit a misguided one, to knock on Ms. Yap's door at about 1:30 AM and ask her to sell him \$20 of gasoline well after her closing hour on October 2, 2008. I find that this evidence is certainly consistent with his level of intoxication and his belief that his new truck's gas tank was empty and that he did not have enough gas to drive the truck back to his house. This evidence was supported by Mr. Thompson and was not contradicted on his cross examination or by Crown witnesses.

[37] Looking at the overall sense of this evidence from Mr. Thompson's perspective, I find that it is illogical that Mr. Thompson, who was neither the owner nor the driver of the truck, and being highly intoxicated would develop a plan to go to Ms. Yap's door and try to purchase \$20 of gas. Moreover, I find that is highly improbable that Mr. Thompson would have gone on to Ms. Yap's doorstep carrying a plastic grocery bag of

full beer bottles, which undoubtedly would have made a clanging sound as they hit each other while he walked, if he had any intent to commit an indictable offense therein. I note, once again, that neither police officer testified that the person on the step or inside Ms. Yap's porch was carrying any bag of beer bottles or that he had anything in his hands.

[38] The only Crown evidence contradicting this version of events is the eyewitness identification by the Constable Haight that the person in the door of Ms. Yap's house had a receding hairline and was in his mid-20s. Constable Murray subsequently identified Mr. Thompson as the person who fled from a place near the bottom of Ms. Yap's stairs to the porch, after a short chase of about 30 to 40 feet until Mr. Thompson fell to the ground. Constable Murray stated that Mr. Thompson had a grocery bag with several beer bottles in his hand which made a clanging noise when he fell. Photographs of the grocery bag with the beer bottles were contained in Exhibit 1.

[39] A closer examination of that eyewitness or visual identification evidence is therefore required. The leading case which provides assistance and guidance to trial courts is the Supreme Court of Canada decision in **Mezzo vs. the Queen**, [1986] 1 SCR 802 which adopted the reasoning of the English Court of Appeal decision in **R. Vs. Turnbull**, [1976] 1 All ER 549. Both of those cases pointed out the frailty of visual identification evidence and gave directions for a court to keep in mind when assessing the

"quality" or weight of this evidence.

[40] The court in **Mezzo** stated that some of the factors which can clearly affect eyewitness evidence are the length of observation, distance at which the observations were made, lighting conditions, obstructions from view, any prior or past recognition factors, time between original observation and subsequent description to the police and any discrepancies between the description and the accused's actual appearance. The court acknowledged that there may also be many other factors, depending on the specific circumstances of the case. Other factors, for example, would be the degree of attention and awareness of the witness at the time of the observation together with the consistency of descriptions by different witnesses.

[41] Applying the **Mezzo** factors to the facts of this case, Constable Haight said that he drove by Ms. Yap's residence at a relatively slow rate of speed when he made his observations, but did not indicate any specific length of time that he had to observe the scene at Ms. Yap's house and the actions of two people in different locations. His attention would have been somewhat diverted by trying to observe the two people at or near the house and by the fact that he was also was driving the car down the highway and about to make a turn. Constable Murray, on the other hand, acknowledged that most of his attention was on the person standing by the passenger side of the parked truck and that he only got a "glimpse" of the person standing at the door of Ms. Yap's residence.

[42] Constable Haight estimated that the police car was at a distance of approximately 60 feet from Ms. Yap's residence when his observations were made. Ms. Yap's evidence, which was confirmed by the police officers, was that there were only a couple of lights left on inside the service station and that there was essentially no lights illuminating the area in front of or at the side of the service station. I therefore conclude that the initial observations made by the two police officers while their car was in motion, and until they actually drove up to Ms. Yap's house, were made under poor lighting conditions.

[43] As for the clothing that was being worn by the two individuals seen at, in or near Ms. Yap's house, Constable Murray said that he saw the male individual with a hoodie on outside the passenger door of the truck. Neither Constable Murray nor Constable Haight made any observations with respect to the clothing of the individual on the doorstep or inside Ms. Yap's house. Constable Haight described the male individual that he saw standing near the truck as being 6 feet tall and he estimated that this person was in his early 20's. He made no observations with respect to what that person was wearing, however he later identified that individual as Mr. Wulf. Constable Haight said that he saw the second person inside the door of the house but gave no other description as to the height, weight or clothing worn by that individual.

[44] Both of the officer's testimony and the photographs filed as exhibits clearly established that as they turned left onto the Cape John Road, Ms. Yap's residence



completely obstructed their view of the two men, according to their own estimates of time, for a minimum of 15 to 30 seconds to a maximum of 1 to 2 minutes. Moreover, given this amount of time that the officers' view was completely obstructed, there would have been a period of time for Mr. Thompson and Mr. Wulf to move about in the short distance between Ms. Yap's doorstep and where Mr. Wulf's truck was parked next to the propane tank by the service station. As a result, the only facts which I can conclude beyond a reasonable doubt are that when Mr. Wulf was arrested, he was standing near his truck and that Mr. Thompson was the one who tried to flee the scene carrying a grocery bag full of beer bottles. Mr. Thompson was arrested by Constable Murray after a short chase.

[45] Considering all of the factors mentioned by the courts in **Mezzo** and **Turnbull**, especially the poor lighting conditions, both officers only having a very short period of time or a glimpse before their views were completely obstructed by Ms. Yap's house for a period of time, their attention being diverted by either driving or trying to make observations of two individuals in two different locations, coupled with relatively few observations that were made with respect to the height, weight and clothing worn by the two individuals, coupled with the defense evidence that Mr. Thompson and Mr. Wulf were wearing the same colored jackets and hoodies, I find that I cannot place a significant amount of weight on the officers' visual identification evidence. As a result, I am not

satisfied beyond a reasonable doubt that it was Mr. Thompson who was the lone individual seen by the RCMP officers inside Ms. Yap's door to the porch of her house.

[46] Moreover, I find that Mr. Wulf's uncontradicted evidence that he alone knocked on Ms. Yap's door at about 1:30 AM on October 2, 2008, when coupled with his guilty plea accepting full legal responsibility for and the sentence imposed by this court on a charge of unlawful entry into a dwelling, is entirely consistent with Mr. Thompson's version of the events related in his evidence. I find that this defence evidence constitutes "evidence to the contrary" which I also find may reasonably be true and therefore I conclude that this evidence rebuts the presumption contained in section 348(2)(a) of the Code that there was a break-in enter with intent to commit an indictable offense.

[47] Finally, dealing with the Crown's position that Mr. Thompson's attempt to flee the scene is post-offence conduct which provides circumstantial evidence of a consciousness of guilt, I note that the Supreme Court of Canada case of **R. v. White**, [1998] 2 SCR 72 is the leading case dealing with post-offence conduct. In **White**, the Supreme Court of Canada stated that post-offense conduct such as an act of flight may be subject to competing interpretations and must be weighed carefully. The question to determine is whether, in light of all of the evidence, the flight is consistent with guilt and inconsistent with any other rational conclusion.

[48] In this case, Mr. Thompson explained that he was running to avoid having his beer

confiscated by the police and steadfastly denied the fact that he had gone into Ms. Yap's house. Mr. Wulf's evidence is consistent with and fully supports Mr. Thompson's version of events. In addition, as I previously mentioned, Constable Haight testified that he saw the person start running from a point approximately 10 feet from Ms. Yap's house. That evidence is again consistent with and essentially supports the version of events related by the two defence witnesses.

[49] I find that Mr. Thompson's attempt to flee from Constable Murray with a grocery bag of beer bottles in his hand, is only circumstantial evidence and consistent with his culpability for the charge of being intoxicated in a public place. Mr. Thompson freely acknowledged that he was guilty of that charge during his testimony in this trial.

[50] As for the break and enter with intent charge, using the words of the Supreme Court of Canada in the **White** case, I do not find that Mr. Thompson's flight is inconsistent with any other rational conclusion, when I consider all of the facts of this case. Mr. Thompson provided evidence that he attempted to flee the scene in order to avoid having his beer confiscated on October 2, 2008. I accept that evidence as another rational conclusion which can be drawn from the all the circumstances of this case, and put another way, it is certainly a reasonable and a competing interpretation for this piece of circumstantial evidence.

**Summary:**

[51] For all of the foregoing reasons, I conclude that the Crown has not proved beyond a reasonable doubt that Mr. Thompson is guilty of the charge of break enter with intent to commit an indictable offence contrary to section 348(1)(a) of the Criminal Code. I hereby acquit Mr. Thompson of that charge.

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JUDGE THEODORE K. TAX, A JUDGE OF  
THE PROVINCIAL COURT FOR THE  
PROVINCE OF NOVA SCOTIA