IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R v. Thackery, 2012 NSPC 111

Date: 2012/12/17
Docket: Docket Number 2264913
Registry: Halifax

Her Majesty the Queen

v.

Dennis Scott Thackery

Judge:	The Honourable Judge Marc C. Chisholm
Heard:	December 17, 2012, in Halifax, Nova Scotia
Charge:	CC 145(5)
Counsel:	Chris Morris, for the Crown Josh Bearden, for the Defence

By the Court:

[1] The accused was charged that he on or about the 11th day of September 2010 at or near Halifax, Nova Scotia, did unlawfully and wilfully resist Cst. Lee Cooke and Cst. Jason Marriott, Peace Officers, while engaged in the lawful execution of their duty, contrary to Section 129(a) of the Criminal Code.

[2] The burden of proving the allegation rests upon the Crown. The accused is presumed innocent and must be acquitted unless the evidence establishes, beyond a reasonable doubt, that the accused committed the alleged offence.

Background

[3] This case involved a man and his bicycle. Mr. Thackery was alleged to have violated the Motor Vehicle Act of Nova Scotia by riding his bicycle without wearing a helmet in a parking garage. When a police officer asked him his name, he refused to give his full name. A physical confrontation ensued. The Crown alleged that Mr. Thackery was being arrested, for the Motor Vehicle offence as it was necessary to do so to establish his identity. The Crown alleged that Mr. Thackery physically resisted

arrest. The Defence submitted that the Crown failed to prove that Mr. Thackery committed an offence under the MVA and, therefore, the arrest was unlawful. In the alternative the Defence submitted that the arrest of Mr. Thackery was unlawful because he was not told the reason for the arrest. In the further alternative the Defence alleged that Mr. Thackery was attacked by the police and merely protected himself.

The Evidence, Assessment of Credibility and Findings of Fact

[4] There was no dispute in relation to the time, date and place of the alleged offence nor the identity of the accused.

[5] The accused did not dispute, and the Court finds, that at approximately 4:00pm on September 11, 2010 he was in a covered parking area (hereinafter referred to as the parkade) on Maitland Street, Halifax, NS and was in possession of a bicycle. He admitted to having driven the bicycle to the parkade. He did not deny driving the bicycle in the parkade but argued that the police couldn't have seen him doing so because of a partial wall surrounding the parkade. Cst Cooke gave evidence that he saw Mr. Thackery operating his bicycle in the parkade. Cst. Marriott testified that he saw the accused riding his bicycle in the parkade. Exhibits 1 and 3, photos of the

parkade, show that any partial wall does not extend around the entire parkade. I accept the officers' evidence and find the accused was riding his bicycle in the parkade and seen doing so by the two officers.

[6] The accused acknowledged that he was not wearing a helmet and the Court so finds.

[7] The parkade was depicted in photos introduced by the Crown (Exhibits 1 and 2) and additional photos introduced by the Defence (Exhibits 3,4 and 5). The parkade is on ground level with a roof above it. The photos suggest there may be an uncovered second parking level above the ground floor parking area. There is a sign on the wall of the parking structure which reads "Monthly Parking, Ashford Properties, Inc. 463-5996". Cst. Marriott agreed the sign was probably there at the time of the alleged offence.

[8] The entrance to the parkade (See Exhibit #2) has a gate and a booth for an attendant.

[9] Cst. Marriott testified that the parkade was for tenants of the MacDonald building, but, for the last 7 years, to his knowledge (he having routinely patrolled the area) the booth was unattended, the gate up and locals just drove in and parked there.

[10] Both police officers testified that there had been a number of recent thefts from the vehicles in the area and they were, therefore, suspicious of the accused's presence in the parkade. They called out to the accused and asked what he was doing. He replied 'nothing'. In his evidence the accused testified that he was in the process of securing his bike before going to dinner at a nearby church.

[11] The police asked the accused to identify himself. Cst. Cooke gave evidence that the accused gave a first name but refused to give a last name. Cst. Marriott testified that the accused refused to give his name. The accused testified that he believed he wasn't required to give his name as he hadn't done anything wrong. He stated that he responded by asking 'why'. He said the police told him about recent thefts from cars. He said there were few cars around so he became nervous, and thought that the police weren't being honest with him. He testified that the police did not mention anything about he being charged for not wearing a helmet while riding his bike, although he was charged with that offence, later at the police station. He testified that both

officers got out of the police car and walked to him. They told him, he was being arrested. He stated that he didn't know why and defended himself when the two officers attacked him, both throwing a punch at his head and later kicking and punching him.

[12] Both police officers testified that they decided to issue the accused a Summary Offence Ticket (SOT) for riding a bicycle without wearing a helmet. They told the accused they needed his name to issue the ticket. They both testified that they told the accused that he could be arrested if he didn't give them his name. They both testified that the accused refused. Cst. Marriott testified that he got out and approached the accused. He stated that the accused dropped his bike and took a combative stance, cocking back his fist. Cst. Marriott testified that he felt the accused may strike him. He told the accused he was under arrest and attempted to take physical control of the accused. The accused physically resisted.

[13] Cst. Cooke's evidence was consistent with the evidence of Cst. Marriott on all significant points. Differences in their testimony the Court attributed to a difference in observations at the time and differences in recollection. These differences did not raise any doubt regarding the credibility of the evidence of either officer.

[14] The Court did not find most aspects of Mr. Thackery's evidence credible.

[15] Mr. Thackery, in giving his evidence, was defensive, and at times, combative, with Crown counsel. He refused to answer a reasonable question regarding the name(s) of person(s) whom he initially said may have witnessed the incident. He then indicated they wouldn't have seen anything. His evidence regarding what occurred varied in its details with subsequent tellings. Several aspects of his evidence were so unlikely as to be not believable, for example that before any physical contact, both officers, at the same moment, threw a punch at him and both missed.

[16] Mr. Thackery's evidence demonstrated a clear bias/prejudice towards the police, generally. His evidence was not believed by the Court nor did it raise any reasonable doubt regarding what transpired.

[17] The Court accepted the evidence of the police witnesses that the accused was told that he could be issued a SOT for not wearing a helmet while riding his bicycle, and that, if he declined to give his name he could be arrested. The Court accepted that Cst. Marriott got out of the police car and approached the accused. Cst. Cooke

followed shortly thereafter. The accused reacted to the officers' approach by dropping his bicycle, taking a combative stance and cocking his right fist.

[18] The Court finds that Cst. Marriott advised the accused that he was under arrest, but did not indicate the reason for the arrest at that time.

[19] The Court accepts the evidence of Cst. Marriott that the actions of the accused gave him reason to believe that the accused may strike him. The Court was not satisfied that Cst. Marriott made contact with the accused to protect himself.

[20] The Court finds that Cst. Marriott made contact with the accused to effect his arrest.

[21] The Court accepted the evidence of the police witnesses that the accused resisted arrest by physically struggling to prevent handcuffs being placed on him and refusing to comply with directions of the officers.

Issues

[22] (I) What is the scope of section 170(A)(2) of the Motor Vehicle Act, RSNS 1989, c.293 as amended (MVA) specifically, does it apply to places other than a highway?

[23] (II) If the scope of section 170(A)(2) is restricted to a 'highway' does the place where Mr. Thackery was operating his bicycle fall within the definition of 'highway' in section 2(u) of the MVA?

[24] (III) If s.170(A)(2) is applicable, has the Crown proven beyond a reasonable doubt that Cst. Marriott had lawful grounds to arrest the accused and that the accused wilfully resisted him and Cst. Cooke?

Issue I - What is the scope of application of section 170(A)(2) of the MVA?

[25] Section 170(A)(2) states:

> No person shall ride on or operate a bicycle unless the person is wearing a bicycle helmet that complies with the regulations and the chin strap of the helmet is securely fastened under the chin.

[26] Determining the scope of this provision is a matter of statutory interpretation. Courts have developed principles to guide in the process of interpreting a statutory provision. Those principles include:

That the words of the provision ought be given their plain, usual, ordinary meaning;

That a section of a statute ought be considered in the context of the entire statute to give reasonable effect to the intent of the legislation;

That the Court ought proceed on the basis that each word of the provision has meaning, ie none of the language is superfluous;

The title of the legislation, whereas clauses and legislative debates may be considered to assist the Court in interpreting the statutory provision(s);

When interpreting a criminal or quasi-criminal provision any doubt regarding whether the provision is applicable to the accused's conduct ought be resolved in favour of the

accused. (In relation to the principles of statutory interpretation see Driedger on the Construction of Statutes, 3rd Edition, Butterworths Ltd, Toronto, 1994).

[27] The defence submits that section 170(A)(2) ought be interpreted to apply only to persons riding a bicycle on a highway as defined in section 2(u) of the MVA

[28] I agree, for the following reasons:

1. The application of section 170(A)(2) to all locations, both public and private would lead to unreasonable, indeed absurd results. For example, if a parent were in a store with their son or daughter for whom they were purchasing a bicycle and the child got on and rode the bicycle a few feet without wearing a helmet would both parent and child be liable to be charged under the MVA? What if the child was testing their new bicycle in their livingroom on Christmas morning, without wearing a helmet, could they be charged? These examples demonstrate that an unrestricted application of section 170(A)(2) of the MVA would lead to absurd, unreasonable results which the Court finds could not have been the intention of the provincial legislature.

2. The full title of the MVA is:

> An Act in relation to the registration and identification of the Motor Vehicles and the use of the Public Highway by such vehicles

This title reflects a legislative intention to restrict the application of the provisions of the MVA to highways.

3. The definition of 'highway' in section 2(u) states:

> (I) a public highway, street, lane, road, alley, park, beach or place including the bridges thereon, and (ii) private property that is designed to be and is accessible to the general public for the operation of a motor vehicle

[29] The extension of the scope of the legislation to private property in this provision of the MVA is tightly defined. This provision provides further evidence of a legislative intention to restrict the scope of the application of the MVA.

[30] To the contrary, certain aspects of the MVA support a broad, interpretation of section 170(A)(2):

(1) The language of section 170(A)(2) does not include the words "on a highway". Given the plain meaning of the words the section appears to apply to all locations, both public and private.

(2) When considering section 170(A)(2) in context, the MVA contains sections which:

(I) include the phrase 'on a highway' (see for example sections 64, 76, and 175 (seatbelts));

(ii) do not include the phrase on a highway (section 170(A)(2), section 170(B)(2), section 97);

(iii) a section which applies to on "a highway or any place ordinarily accessible to the public..." (Section 180), and;

(iv) sections that apply to roadways (a subset of 'highway') as defined in section 2(bg).

As a principle of statutory interpretation the Court ought to interpret these provisions in a manner that gives meaning to the different language employed in the various sections. To restrict s.170(A)(2) to 'on a highway' when those words are not included in the wording of the provision would lead to the conclusion that the inclusion of those words in other sections was superfluous. This would be contrary to the principles of the statutory interpretation.

(3) The title of the Act refers to 'motor vehicle' and 'such vehicles'. The definition of motor vehicle in section 2(ad) does not include a bicycle.

The definition of vehicle in section 2(ca) would appear to include a bicycle.

Bicycle is defined in section 2© as a vehicle.

Section 137 specifies that for the purpose of sections 131-136 a bicycle is a vehicle.

If a bicycle is a vehicle what purpose is served by section 137?

[31] The Court's application of the principles of statutory interpretation to the relevant provisions of the MVA has identified difficulties with either of the two interpretations considered. This legislation would benefit from a consolidation and review/revision of the language to clearly express the legislative intent. The MVA is a quasi-criminal statute and, therefore, any uncertainty as to whether s. 170(A)(2) applies to the actions of the accused in the parkade in question must be resolved in favour of the accused. There is uncertainty regarding the scope of section 170(A)(2) which the Court has resolved in favour of the accused.

[32] The Court finds that section 170(A)(2) applies only to persons riding on or operating a bicycle on a highway, as defined in section (2)(u) of the MVA.

Issue II - Is the Parkade a 'highway'?

[33] Highway is defined in section (2)(u) of the MVA as:

> (I) a public highway, street, lane, road, alley, park, beach or place including the bridges thereon, and (ii) private property that is designed to be and is accessible to the general public for the operation of a motor vehicle

[34] On the evidence, the Court finds that 2(u)(I) does not apply to the parkade. All the evidence before the Court was that the parkade property was private property.

[35] Section 2(u)(ii) was considered, in *Walsh v. Marwood Ltd.*, [2009] N.S.J. No. 92 (NSSC).

[36] In *Walsh* an accident occurred at a private lumber yard. Members of the public entered the property in motor vehicles in order to transact business. The accident occurred when an employee of the lumber yard was unloading material from a delivery truck by using a forklift and some material fell on the delivery truck driver. The truck driver made a claim to the Worker's Compensation Board. The Board issued two decision (No. 2002-928-TPA and 2004-390-TPA). The Board found that both elements of design and accessibility must be present under s. 2(u)(I). The Board found that the lumber yard was not accessible to the general public but only to customers and under certain restrictions and, therefore, was not a highway.

[37] The Board stated:

> "Mere opportunity to access private property, in circumstances where the intent of the owners is to preclude access to all but certain, limited invitees, is insufficient to satisfy the definition."

[38] A civil action was filed in the Nova Scotia Supreme Court on behalf of the injured worker, Walsh. Justice MacDougall, of the Supreme Court found that, the words, "accessible to the general public" in Section 2(u)(ii) required proof that the property was designed to be and was accessible to all members of the public for the operation of a motor vehicle not just customers of the property owner or their tenant(s).

[39] In *Spencer v. Lutkehaus*, [1986] BCJ No. 130 (BCCA) the Court considered the British Columbia Motor Vehicle Act definition of highway and found that the use of the words accessible to the general public required proof that all members of the public were intended to access and able to access the property. Consequently, a business parking lot, or a shopping mall parking lot which, viewed objectively, is intended for use of customers only, would not be included. The BC provision included an additional clause covering places accessible to the "public". The Court

interpreted the word “public” as broader in scope than general public and found that it included business parking lots.

[40] In *Landzaat v. Central Amusement Co.*, [2000] NSJ No. 472 the Court heard an action in tort for damages arising from an accident in a parking lot of a shopping centre. The parties agreed that section 2(u)(ii) of the MVA was applicable to the parking lot of a shopping mall.

[41] Because the parties agreed to the application of Section 2(u)(ii) the Court did not discuss the meaning of “general public” in Section 2(u)(ii) and there was no evidence of what signage or barriers were present at the entrances to the parking lot, nor what access was permitted to or restrictions placed upon members of the general public. For these reasons the Court finds the decision to be of limited precedent value. The Court found the decisions in *Walsh v. Marwood Ltd.* and *Spencer v. Lutkehaus* persuasive. This Court finds that the words “general public” in Section 2(u)(ii) refers to all members of the public not just customers of the property owner or their tenants.

[42] The evidence before this Court was that:

(1) The parkade was for the use of persons in the MacDonald building, adjacent thereto;

(2) There was a sign indicating the parkade was intended for persons who contracted to park on a monthly basis;

(3) There was a booth for a parkade attendant;

(4) There was a swinging gate/bar to restrict access.

[43] This evidence of the physical structure and signage persuaded the Court that the parkade was not designed for use by the general public.

[44] There was evidence that the swinging bar gate was always up, there was no attendant, local people used the parkade, apparently without permission, and there was no enforcement of any access restrictions.

[45] This evidence of possibly unintended, unauthorized use of the property by some members of the public and lack of enforcement of access restrictions did not persuade the Court that the property's design nor the intended use of the parkade changed.

[46] The Court finds that the parkade was not a highway as defined in section 2(u)(ii) of the MVA.

Issue III - Has the Crown proven that Cst. Marriott had lawful grounds to arrest and the accused wilfully failed to comply?

[47] The Court found that Cst. Marriott witnessed the accused riding his bicycle while not wearing a helmet in the parkade.

[48] The Court finds that Cst. Marriott honestly believed that in doing so, in the parkade, the accused was violating section 170(A)(2) of the MVA.

[49] Considering the wording of section 170(A)(2) of the MVA, the Court finds that Cst. Marriott's belief that the law extended to the parkade was reasonable.

Power of Arrest

[50] Section 261 of the MVA states:

> (1) A peace officer may arrest without warrant a person whom he finds committing an offence or has reason to believe has recently committed an offence against this

> Act. (2) A peace officer making such arrest without warrant shall with reasonable diligence take the person arrested before a judge of the provincial court or justice of the peace to be dealt with according to law. R.S., c. 293, s. 261.

[51] In this case the arresting officer testified to finding the accused committing an offence. There was no evidence he held any belief of a recently committed offence.

[52] Section 7(1) of the Summary Proceedings Act, RSNS 1989., c.450 as amended states:

> Except where and to the extent that it is otherwise specially enacted, the provision of the Criminal Code (Canada) except section 734.2, as amended or re-enacted from time to time, applicable to offences punishable on summary conviction, whether those provisions are procedural or substantive and provisions which impose additional penalties and liabilities apply, mutatis mutandis to every proceeding under this Act

[53] Section 495 of the Criminal Code states:

> (1) A peace officer may arrest without warrant
>
> (*a*) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;
>
> (*b*) a person whom he finds committing a criminal offence; or

(*c*) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.

(2) A peace officer shall not arrest a person without warrant for (*a*) an indictable offence mentioned in section 553,

(*b*) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction, or

(*c*) an offence punishable on summary conviction,

in any case where

(*d*) he believes on reasonable grounds that the public interest, having regard to all the circumstances including the need to

(I) establish the identity of the person,

(ii) secure or preserve evidence of or relating to the offence, or

(iii) prevent the continuation or repetition of the offence or the commission of another offence,

may be satisfied without so arresting the person, and

(*e*) he has no reasonable grounds to believe that, if he does not so arrest the person, the person will fail to attend court in order to be dealt with according to law.

(3) Notwithstanding subsection (2), a peace officer acting under subsection (1) is deemed to be acting lawfully and in the execution of his duty for the purposes of

> (*a*) any proceedings under this or any other Act of Parliament; and
>
> (*b*) any other proceedings, unless in any such proceedings it is alleged and established by the person making the allegation that the peace officer did not comply with the requirements of subsection (2). R.S., c. C-34, s.450; R.S., c.2 (2nd Supp), s. 5; R.S.C. 1985, c. 27 (1st Supp.), s. 75.

[54] Both section 261 of the MVA and section 495 of the Code require that, to arrest without warrant, a peace officer must find a person committing an offence.

[55] In R v. Biron, [1976] 2 S.C.R. 56 (SCC) Justice Martland for the majority, at p.526 stated:

> ...[I]t is impossible to say that an offence is committed until the party arrested has been found guilty by the Courts. If this is the way in which this provision is to be construed, no peace officer can ever decide, when making an arrest without a warrant, that the person arrested is 'committing a criminal offence'. In my opinion the wording used in para (b) which is over simplified, means that the power to arrest without a warrant is given where the peace officer himself finds a situation in which a person in apparently committing an offence.

[56] And further at page 529 the Court stated:

> My view is that the validity of the arrest under the paragraph must be determined in relation to the circumstances which were apparent to the peace officer at the time of the arrest was made.

[57] The facts in Biron were that Biron was in a restaurant/bar when it was the subject of an authorized police raid. Biron refused to tell the police his name and was loud and abusive of the police. He was arrested for causing a disturbance. He was removed and turned over to a second officer whom he resisted when that officer attempted to place him in a police wagon. At trial Biron was convicted of both causing a disturbance and resisting arrest. On summary conviction appeal he was acquitted on the disturbance charge, because the public peace was not disturbed by his actions, but convicted on the resistance charge. The Quebec Court of Appeal upheld the acquittal on the disturbance and acquitted Mr. Biron on the resisting charge on the basis that the arrest for the disturbance had been unlawful and, therefore, the police were not in execution of their duty when he 'resisted' them.

[58] The Supreme Court of Canada in a 5:3 decision allowed the appeal. The Court found that the arrest of Biron was lawful as he did cause a disturbance in a public place and, therefore, the police were in the execution of their duty when the accused resisted.

[59] In *R v. Stevens* (1976), 33 CCC (2d) 429 (NSCA) the Court dealt with charges of causing a disturbance and resisting arrest. The Court, following *Biron*, supra, held

that under section 495, for arrest without warrant on a summary conviction offence the Crown must show that the officer found a situation in which a person was apparently committing an offence.

[60] In *Stevens* the accused was acquitted on the disturbance charge on the basis that he was in a dwelling house and not in a public place at the time. The Court found that the arrest of the accused was unlawful and, therefore, the peace officer was not in the lawful execution of his duty and the resistance charge must fail (*Regina v. Slipp* (1970), 2 N.B.R. 845 (N.B.C.A.); *R v. Middleton*, [1969] 1. O.R. 275 (Ont. C.A.)).

[61] The Court in *Stevens* distinguished the *Biron* decision on the facts, stating at para 27:

> If the respondent was in the dwelling house at all material times then (and unlike the factual situation in the *Biron* case) it cannot be said that the police officer found the respondent apparently committing a disturbance contrary to s. 171 of the *Code.*

[62] In *R v. Sharme*, [1993] 1. S.C.R. 650 (SCC) the accused resisted arrest on a charge of violating a municipal by-law regarding street vending. The Supreme Court, overturned the accused's conviction, finding that the by-law was discriminatory and, therefore, ultra vires the municipality.

[63] The Court in referring to its earlier decision in *Biron* stated, at para 32:

> Biron deals with apparent perpetration of an offence, not apparent offences, and as such it cannot be relied upon to confer on police the power to charge someone with obstruction where there is an apparent violation of a law which itself is invalid.

[64] In the present case Cst. Marriott reasonably believed that he had witnessed the accused apparently committing a violation of the MVA, s. 170(A)(2).

[65] Cst. Marriott's belief was based on a mistake of law, that is, that section 170(A)(2) was applicable to the parkade where the accused was riding his bicycle without a helmet. A conviction under these circumstances could not have resulted. Therefore, following the rationale in *Stevens,* supra, the Court finds that, on the facts of this case, it cannot be said that Cst. Marriott apparently found the accused committing an offence. Consequently, the Court finds that the arrest of the accused was unlawful. Cst. Marriott made contact with Mr. Thackery to make an arrest. Cst. Cooke assisted in that process. The Court finds that in doing so neither were in the lawful execution of their duty.

[66] The Court finds that the accused in this case may not be convicted for resisting an unlawful arrest based upon the mistakenly perceived authority under section 495 of the Code or section 261 of the MVA. The Court was not satisfied that any other authority to arrest had been proven beyond a reasonable doubt.

[67] The Court finds the accused not guilty.