

**IN THE PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** R. v. Thompson 2016 NSPC 75

**Date:** December 9, 2016

**Docket:** 2723111

**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

Caitlin Faye Thompson

**DECISION - MOTION FOR A DIRECTED VERDICT**

**Judge:** The Honourable Judge Anne S. Derrick

**Heard:** December 5, 6, 7 and 8, 2016

**Decision:** December 9, 2016

**Charges:** section 140(1)(b) of the *Criminal Code*

**Counsel:** Erica Koresawa, for the Crown

Luke Craggs for Ms. Thompson

**By the Court:***Introduction*

[1] On New Year's Day 2014, Matthew Penney's body was found burning on the Oakfield Park Road, a rural area outside Halifax. He had been shot in the head.

[2] On January 5<sup>th</sup>, the police questioned Caitlin Thompson about Mr. Penney attending a New Year's Eve party at her home. The police came to believe Ms. Thompson had misled them and she was subsequently charged with public mischief.

[3] At the close of the Crown's case, Mr. Craggs made a motion for a directed verdict of acquittal on the basis that there is no evidence Ms. Thompson did anything to cause an innocent person to be suspected of having committed an offence in relation to Mr. Penney's death. Mr. Craggs submits that casting suspicion on another person is an essential element of the charge against Ms. Thompson. Mr. Craggs also submits that what Ms. Thompson told police was not to divert suspicion away from herself but from others and that doing so is not an offence under section 140.

*The Basic Facts*

[4] Ms. Thompson told police on January 5<sup>th</sup> there had been a small New Year's Eve party at the home she shared with Jason MacKenzie on 3 Springhill Road in Dartmouth. Mr. MacKenzie had brought over three friends to welcome in the new year – Tyler Berry and his girlfriend, Keisha Slawter-Vassell, and Matthew Penney. Ms. Thompson told the investigators Mr. Penney left after midnight and she did not know where he was going.

[5] Police investigators conducted an extensive search for evidence of Mr. Penney's movements in the early morning hours of January 1<sup>st</sup>. They turned up nothing. In February they received information that indicated Mr. Penney had not left the Thompson/MacKenzie residence as claimed by Ms. Thompson. They refocused their attention on the home and retrieved some relevant evidence out of garbage from the residence that had been placed at the curb. On March 20, 2014 Ms. Thompson, Mr. MacKenzie, Mr. Berry and Ms. Slawter-Vassell were arrested for murder.

[6] The trial evidence has included Ms. Thompson's interrogation by police on March 20. In that interrogation she told police that Mr. Penney had been shot and killed at her home in the early morning hours of January 1<sup>st</sup>. She was upstairs at the time and did not witness the shooting. She was told that Tyler Berry had shot Mr. Penney by accident. Mr. MacKenzie told her that he and Mr. Berry had removed Mr. Penney's body from the house and set it on fire.

*The Charge Laid Against Ms. Thompson*

[7] Ms. Thompson was charged jointly with Ms. Slawter-Vassell for misleading the police. The charge states they

Did commit public mischief in that with intent to mislead, they caused Peace Officers to enter upon or continue an investigation by making a false statement about their knowledge or involvement in regards to the death of Matthew Penney to divert suspicion from themselves, contrary to section 140(1)(a) of the Criminal Code.

[8] Additional charges were laid against Ms. Slawter-Vassell in the same Information. She changed her plea to certain charges and only Ms. Thompson went to trial.

*Sections 140(1)(a) and (b) of the Criminal Code*

[9] Mr. Craggs has noted that the wording of the charge against Ms. Thompson tracks the statutory language in section 140(1)(b) of the *Criminal Code* and not the language of section 140(1)(a), the section recited in the Information.

[10] The language of section 140(1)(a) states that "Everyone commits public mischief who, with intent to mislead, causes a peace officer to enter on or continue an investigation by making a false statement that accuses some other person of having committed the offence."

[11] Section 140(1)(b) states that "Everyone commits public mischief who, with intent to mislead, causes a peace officer to enter on or continue an investigation by doing anything intended to cause some other person to be suspected of having

committed an offence that the other person has not committed, or to divert suspicion from himself.”

[12] Ms. Thompson is accused of having misled police by making a false statement “to divert suspicion from themselves”. The “divert suspicion” language is section 140(1)(b) language and the reference to “themselves” reflects the joint charging of Ms. Thompson and Ms. Slawter-Vassell.

[13] Mr. Craggs and the Crown have noted that the charge laid against Ms. Thompson erroneously references section 140(1)(a) rather than section 140(1)(b). As there is no variance between the evidence and the charge, I do not believe it is necessary to amend it but I will do so under section 601 of the *Criminal Code* as the Crown has requested it. As Mr. Craggs has said, the section number is not essential to the charge and the wording used for the charge clearly reflects the wording of section 140(1)(b).

*The Position of the Parties on Some Evidence Before the Court and the Essential Elements of the Offence*

[14] The issue to be determined on a motion for a directed verdict is whether there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty. A motion for a directed verdict will fail where there is admissible evidence, which could, if believed, result in a conviction. (*R. v. Acuri*, [2001] S.C.J. No. 52, paragraph 21)

[15] Mr. Craggs has conceded there is some evidence Ms. Thompson intentionally made a false statement to police investigators that Matthew Penney left the New Year’s Eve party and that as a result the investigators continued to investigate where he may have gone.

[16] Mr. Craggs submits there is no evidence however that Ms. Thompson “did anything intended to cause some other person to be suspected of having committed an offence that the other person has not committed.” Mr. Craggs says that without this evidence a reasonable jury properly instructed could not convict Ms. Thompson of the charge against her.

[17] Mr. Craggs submits that it is an essential element of an offence under section 140(1)(b) that Ms. Thompson have caused the police to suspect another person of

committing an offence that person did not commit. There is no evidence of that in this case. Ms. Thompson's allegedly false statement to the police did not cause them to suspect someone else of having committed an offence in relation to Mr. Penney.

[18] Mr. Craggs raises a further challenge to the viability of the charge against Ms. Thompson. He says that she cannot be said to have been diverting suspicion from herself with what she told the police investigators on January 5<sup>th</sup> because the evidence from her police interrogation indicates not only did she have nothing to do with Matthew Penney's shooting, she believed it was an accident. Mr. Craggs argues that on January 5<sup>th</sup> Ms. Thompson did not view herself as a suspect and was not suspected of anything so there was no suspicion to divert. Mr. Craggs says the allegedly false statement to police was to cover for others, namely Tyler Berry and Jason MacKenzie and that does not amount to public mischief.

[19] In sum, it is Mr. Craggs' submission that there is no evidence Ms. Thompson caused an innocent person to be suspected nor any evidence that she did anything to divert suspicion from herself. It is his position there is some evidence only that she told police a false story that caused them to keep looking for where Mr. Penney went after the party. Mr. Craggs says this alone does not attract criminal liability under section 140(1)(b) of the *Criminal Code*.

[20] Ms. Koresawa takes a very different view of section 140(1)(b). She says it encompasses a broad range of public mischief conduct. She submits that it is not only an offence under section 140(1)(b) to cause the police to suspect an innocent person of committing a crime, it is also an offence if all the person does, with the intention to mislead the police, is something that diverts suspicion from him or herself. She notes that the language used in the charge against Ms. Thompson of diverting suspicion from "themselves" reflected the fact that Ms. Thompson was originally charged jointly with Ms. Slawter-Vassell.

### *Case Law*

[21] I want to indicate my appreciation to counsel for their efforts in trying to locate helpful cases. It appears that public mischief is often perpetrated by intentionally misleading the police with an accusation of criminal wrongdoing against an innocent person. For example, *R. v. Delacruz*, [2009] O.J. No. 5536

(S.C.J.), is a case of a false report by Mr. Delacruz to Children's Aid, who then contacted the police, that his teenage daughter was being sexually abused by the boyfriend of his ex-wife. Mr. Delacruz was charged under section 140(1)(c) of the *Criminal Code*. Section 140(1)(c) makes it an offence to intentionally mislead the police by reporting that an offence has been committed when it has not been. In the context of dismissing a motion for a directed verdict, Baltman, J. said the following: "The purpose of s. 140 is not difficult to ascertain; it is intended to protect innocent persons "from the grievous and fearful consequences that can flow from false accusations." (*Delacruz*, paragraph 11) In making this statement, Baltman, J. was quoting from an Ontario Court of Appeal decision, *R. v. J.J.*, [1988] O.J. No. 1247. As Ms. Koresawa pointed out, in *R. v. J.J.* the Ontario Court of Appeal dealt with the identically-worded predecessor section to section 140(1)(c) and made its reference to the principle of protecting innocent persons from "the grievous and fearful consequences that can flow from false accusations" in relation to that section. (*J.J.*, paragraph 14)

[22] Mr. Craggs relies on *Delacruz* and the statement made by Baltman, J. about the purpose of section 140 to argue that an essential element of section 140(1)(b) is a false accusation against an innocent person. He says *Delacruz* is an expansion of the Ontario Court of Appeal's view in *J.J.* twenty years earlier of the harm the public mischief provisions were enacted to address. I understand him to be saying that *Delacruz* is persuasive on the issue that an essential element of section 140(1)(b) is a false accusation that an innocent person has committed a crime. This ties back to his point that there is no evidence of Ms. Thompson making any such accusation.

[23] Mr. Craggs also relies on *R. v. T.S.*, [2011] O.J. No. 2044 (C.J.) which referred to the sentencing decision in *R. v. Delacruz* ([2010] O.J. No. 2425). The court in *T.S.* said that Baltman, J. noted "two categories" of public mischief cases – false accusations against an anonymous individual so as to evade liability and false accusations against an identified individual for purposes of revenge or punishment. Mr. Craggs submits this bolsters his argument that the offence of public mischief is made out only where there is an accusation against another person, who is either a real person or a concocted one.

[24] It is to be noted that Baltman, J. referred to the “two categories” of public mischief offenders in the context of sentencing Mr. Delacruz for public mischief under section 140(1)(c).

[25] In *Regina v. Wong*, [1976] A.J. No. 571 (S.C.), another case provided by Mr. Craggs, Mr. Wong was acquitted of public mischief even though he had given a false name to a police officer investigating him for fraud. The reason for the acquittal was that Mr. Wong had been charged under what is now section 140(1)(a) – that he had, with intent to mislead, made a false statement that accused some other person of having committed an offence. Plainly that is not what he had done: he had not accused someone else and consequently he was entitled to be acquitted.

[26] It is apparent to me that had Mr. Wong been charged under what is now section 140(1)(b) he would have been convicted. By intentionally giving the police officer a false name, he had tried to divert suspicion from himself. He was acquitted of the public mischief offence simply because the wrong charge was laid against him.

[27] A false name-public mischief case out of the Newfoundland and Labrador Provincial Court produced a conviction under section 140(1)(b). Ms. Koresawa supplied *R. v. Evans*, [2015] N.J. No. 236 where the evidence established that Mr. Evans, under investigation for impaired driving, had falsely identified himself to police and given different dates of birth. Mr. Evans testified that he knew “the information was not correct.” Although the court did not analyze section 140(1)(b) it is apparent that Mr. Evans was convicted because he intentionally misled police to divert suspicion from himself. He was guilty of public mischief under section 140(1)(b) notwithstanding the fact that he had not made a false accusation against an innocent person.

#### *Analysis – The Essential Elements of a section 140(1)(b) Offence*

[28] The public mischief provisions under section 140 of the *Criminal Code* cover a range of criminal misconduct. All four subsections – sections 140(1)(a), (b), (c) and (d) – require an intention to mislead that causes a peace officer to enter on or continue an investigation. The intentional misleading can be perpetrated in a variety of ways. As I have just discussed, section 140(1)(a) requires a false statement being made that accuses “some other person” of having committed an

offence. Section 140(1)(c) requires reporting that an offence has been committed when it has not been committed. Section 140(1)(d) requires the false reporting of a death that has not occurred. And, to reiterate what I said earlier in these reasons, section 140(1)(b) criminalizes the doing of “anything intended to cause some other person to be suspected of having committed an offence that the other person has not committed, or to divert suspicion from himself.”

[29] I am not persuaded by Mr. Craggs’ submission that an essential element of section 140(1)(b) is always a false accusation against another person. The two types of impugned conduct identified in section 140(1)(b) are separated by a comma and the disjunctive “or” which means that public mischief is made out if either form of misconduct is perpetrated – either doing something intended to cause some other person to be suspected of a crime or doing something intended to divert suspicion. That is how culpability was fixed in *R. v. Evans*: intentional misleading to divert suspicion was all that was required for a conviction. That, I believe, is the correct way to interpret section 140(1)(b).

[30] As I mentioned previously, Mr. Craggs’ other argument on this motion is that Ms. Thompson cannot be convicted under section 140(1)(b) for making a false statement to divert suspicion away from someone else. Mr. Craggs says that section 140(1)(b) is aimed at conduct, such as making a false statement, that is intended to divert suspicion away from the person making the statement. That in Mr. Craggs’ submission is the ambit of the provision. In my view this submission is untenable.

[31] The purpose of the public mischief provisions is not just to protect innocent people from the vexation and trauma of a false accusation. There is a public interest in prohibiting conduct that intentionally throws an investigation off track or sends investigators on a wild goose chase. The purpose of section 140(1)(b) extends to preventing valuable investigative time and resources from being diverted, wasted or misapplied. While the police chase a false story, relevant evidence may disappear, a dangerous perpetrator remains at large, and witnesses may be intimidated, suffer memory lapses, or simply vanish.

[32] The broad scope of section 140(1)(b) seeks to protect the integrity and efficiency of police investigations into crime. It is contrary to that broad scope to



interpret the section as fixing criminal liability only in the narrow circumstances of the false statement being made to divert suspicion from the statement-maker. I find section 140(1)(b) captures the telling of a false story by a narrator who is participating in a joint endeavour to divert suspicion.

[33] There is evidence that Ms. Thompson falsely claimed to police that Matthew Penney had left the New Year's Eve party when she knew he had been shot to death in the house. There is evidence that she made the false statement at the instigation of Tyler Berry and Jason MacKenzie so that the police would think that what had happened to Mr. Penney had happened once he left 3 Springhill Road.

[34] The evidence indicates that Ms. Thompson made the false statement to the police knowing that she had not been involved in Mr. Penney's death. But she had been present in the house at the time of the shooting and was a witness to the admissions made by Mr. Berry and Mr. MacKenzie about what had happened. She was mixed up in the terrible events that had occurred. The evidence I have heard to this point in the trial is that Ms. Thompson went along with the plan to divert the police investigation away from all of them. The agreed-upon story for the police was that none of them knew anything that could help solve the mystery of Matthew Penney's homicide. That story was intended to cause the police to conclude there was nothing to learn from Ms. Thompson or any of the others about how Matthew Penney ended up on the Oakfield Park Road with a bullet hole in his head.

[35] I find there is some evidence that Ms. Thompson, with intent to mislead, gave police investigators a false statement on January 5<sup>th</sup>, 2014 to divert suspicion away from the group she was a part of, the group who had been celebrating the new year together when it all went terribly wrong and Mr. Penney was shot and killed. The fact that Ms. Thompson played no role in Mr. Penney's death is irrelevant. Police investigators were trying to learn how Mr. Penney had ended up dead. They traced his last known whereabouts to Ms. Thompson's home. They asked her to tell them about the New Year's Eve party. There is evidence that she told them a false story to throw them off the scent - Mr. Penney left and she did not know where he was going. I find the Crown has advanced some evidence of what section 140(1)(b) criminalizes: Ms. Thompson telling a false story intended to

divert suspicion from herself and the others of their involvement in what happened to Mr. Penney, his shooting and the cover-up that followed. Ms. Thompson's statement ensured that suspicion did not fall on her and the others for some time.

*Conclusion*

[36] I am satisfied there is some evidence on all the essential elements of the charge against Ms. Thompson. The motion for a directed verdict is dismissed.

Anne S. Derrick, JPC