PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R v. Kloet*, 2023 NSPC 47

Date: 20231023
Docket: 8588622
Registry: Pictou

Between:

His Majesty the King

v

Michelle Yvonne Kloet

NO-EVIDENCE RULING

Judge:	The Honourable Judge Del W. Atwood
Heard:	September 29, 2023 and October 23, 2023, in Pictou, Nova Scotia
Charge:	Section 129(a), *Criminal Code of Canada*
Counsel:	Kevin Gillespie for the Nova Scotia Public Prosecution Service Michelle Yvonne Kloet, not represented by counsel

NOTE: In reducing to writing the oral decision rendered in this matter, editing has taken place to include omitted citations and quotes from secondary sources and to make changes to format or to grammar for readability. No changes have been made to the substantive reasons for decision.

By the Court:

Synopsis

[1] Michelle Yvonne Kloet is charged with one summary count of resisting a peace officer, case 8588622, information 841279; this is the wording of the charge:

> Michelle Yvonne Kloet, on or about 31 July 2023, at or near New Glasgow, Nova Scotia, did resist Jason MacKinnon, a peace officer for the Town of New Glasgow, engaged in the execution of his duty, contrary to section 129(a) of the *Criminal Code.*

[2] The prosecution has closed its case.

[3] Ms Kloet is not represented by counsel; she has not called any evidence at this point.

[4] Prior to the adjournment of proceedings on 29 September 2023, I raised with the parties two questions:

- Given that Ms Kloet is not represented by counsel, does the Court have the obligation to raise, of its own motion, the issue of whether an essential element of the offence remains unproven?

- If the answer to the first question is affirmative, is there any evidence that Det/Sgt MacKinnon was engaged in the lawful execution of his duty in arresting Ms Kloet for illegal possession of liquor?

The obligation to raise a no-evidence issue

[5] While I have not identified any reported decisions that have dealt directly with this issue, good guidance has been compiled by the federal judiciary: National Judicial Institute, *Self-Represented Litigants and Self-Represented Accused Electronic Bench Book*, 1 July 2019 rev, (Ottawa: National Judicial Institute, 2015), at 213 [*Bench Book*]:

> The judge should consider the obligation to raise the issue of a directed verdict on one or more counts with the Crown if there is no evidence upon which a reasonably instructed jury could return a verdict of guilty.

[6] The *Bench Book* evolved from the Canadian Judicial Council's Statement of Principles on Self-represented Persons [Principles]: online at Canadian Judicial Council Issues Statement of Principles on Self-Represented Litigants and Accused Persons (cjc-ccm.ca). While not binding or authoritative, the Principles were adopted expressly in *Pintea v Johns*, 2017 SCC 23 at ¶ 4. As of today's date, I have found 298 reported decisions which have cited and relied on the Principles. I should follow them, and follow the guidance offered in the *Bench Book*.

[7] Accordingly, I am satisfied that the Court should raise a no-evidence issue of its own motion when trying a case with an unrepresented accused person.

Is there any evidence that Det/Sgt MacKinnon was engaged in the execution of his duty when he arrested Ms Kloet for illegal possession of liquor?

Pertinent trial evidence

[8] The Court heard from a number of police witnesses. Det/Sgt Jason MacKinnon and Cst Tyler Shipley offered the most pertinent evidence.

[9] Det/Sgt MacKinnon was the shift supervisor dealing with police deployment the final night of the 2022 Riverfront Jubilee. He was called to a location near the East River Bridge where Cst Shipley was attempting to arrest a companion of Ms Kloet's.

[10] Just prior to Det/Sgt MacKinnon's arrival, Cst Shipley had seen Ms Kloet and two companions (one male and one female) in possession of what appeared to be cans of beverage alcohol, possibly vodka coolers [in this decision, the terms "beverage alcohol" and "liquor" are used interchangeably], outside the boundaries of the licenced area for the Jubilee event; Cst Shipley had told these three people to pour out their beverages. Cst Shipley then followed Ms Kloet and her companions around the bridge; when he came upon them again, he found one of them—not Ms Kloet—still in possession of her cooler; he directed this person to pour it out. Ill advisedly, Ms Kloet's companion drank her beverage, in defiance of Cst Shipley's instructions; Cst Shipley proceeded to

place this person under arrest. Ms Kloet objected to the arrest; she began yelling at Cst Shipley and getting in his way. Cst Shipley called for assistance from Det/Sgt MacKinnon.

[11] Cst Shipley told Det/Sgt MacKinnon that Ms Kloet had "illegally possessed liquor" a short time earlier in the evening. That was the extent of the information provided by Cst Shipley to Det/Sgt MacKinnon, according to Cst Shipley and Det/Sgt MacKinnon's testimony.

[12] Det/Sgt MacKinnon proceeded to arrest Ms Kloet for "illegal possession of liquor." Ms Kloet pulled away and said that she was not consenting to being arrested. Det/Sgt MacKinnon eventually took Ms Kloet to the ground, applied a restraint device, and arranged to have her transported to the New Glasgow Regional Police headquarters; Ms Kloet was released on process a short time later. Police then laid the information that is before the Court.

[13] At the time of her arrest, Ms Kloet was not in possession of liquor, and Det/Sgt MacKinnon did not see her in possession of any. Det/Sgt MacKinnon relied on the information he had received from Cst Shipley that Ms Kloet had been in possession of liquor earlier in the evening.

Elements of a para 129(a) offence

[14] Paragraph 129(a) of the *Code* states:

> 129 Every one who
>
> (a) resists or wilfully obstructs a public officer or peace officer in the execution of his duty or any person lawfully acting in aid of such an officer,
>
> . . .
>
> is guilty of
>
> . . .
>
> (e) an offence punishable on summary conviction.

[15] In *R v. Boone*, [2022] NJ No 108 at ¶ 41-45 (PC) [*Boone*], the presiding judge listed comprehensively the elements of a ¶ 129(a) offence. While there might be come controversy regarding the mental element (*cf R v. Alsager*, 2016 SKCA 91, at ¶ 48 and 53), that is not an issue that requires a decision in this case.

[16] As noted in *Boone* at ¶ 45-47, one of the external elements is proof that the peace officer who was resisted or obstructed was engaged in the lawful execution of a policing duty. As underscored in *Boone* (citing *R v. Noel* (1995), 101 CCC (3d) 183 (BCCA) at ¶ 14-15) the concept of duty requires more than proof of an officer simply "being on duty". Furthermore, the police conduct must have been lawful: *R v. Lauda*, 1999 CarswellOnt 1833 at ¶ 106-109 (CA); *R v. Thomas*, 1991 CarswellNfld 221 at ¶ 67, aff'd [1993] SCJ No 27. The

principle of contemporaneity would require that the obstructive conduct happen at the same time as the execution of the policing duty.

Arrest power under the Liquor Control Act/§ 495 of the Code

[17] The *Liquor Control Act*, R.S.N.S. 1989, c. 250, § 111(1) and 117(5) [*LCA*] describes the police power to arrest a person who possesses liquor illegally: to be lawfully arrestable, the person must be "found committing" the offence. This works in contrast to, say, § 261 of the *Motor Vehicle Act*, R.S.N.S. 1989, c. 293 [*MVA*], which permits police to effect a lawful arrest when there is reason to believe a person "has recently committed" an *MVA* offence.

[18] In *Blinn v. Annapolis Royal (Town) Police Department*, 2018 NSSC 236 at ¶ 177 [*Blinn*], the trial judge applied the *Summary Proceedings Act*, R.S.N.S. 1989, c. 450, § 7 [*SPA*]; this provision incorporates summary-offence provisions of the *Code* into any "proceeding" under the *SPA*. In the result, the judgment in *Blinn* relied on § 495 of the *Criminal Code* to define the power of police to effect a lawful arrest for an offence under the *MVA*. That the judge in *Blinn* did so is noteworthy, as the case was a civil-litigation trial for an alleged wrongful arrest, and was not a "proceeding" under the *SPA*. Still, the analysis in *Blinn* makes sense: had the case been a summary-offence proceeding under the *MVA* with a

controversy over the lawfulness of Mr Blinn's arrest, resort to § 495 of the *Code* through § 7 of the *SPA* would have been an inevitable outcome. Police arrest powers for a provincial-statute offence will be static, and not dependent on the nature of the proceedings where the power is judicially analyzed. Accordingly, just as in *Blinn*, I will apply § 495 of the *Code* to help determine whether the arrest of Ms Kloet was lawful.

[19] Paragraph 495(1)(b) of the *Code* creates an arrest power for summary-conviction offences that matches the power in the *LCA*: police must find the person actually committing an offence in order to effect a lawful arrest.

[20] Paragraph 495(2)(c) directs police not to arrest persons for summary-conviction offences, subject to identity-verification, preservation-of-evidence, crime-prevention and assurance-of-court-attendance criteria described in ¶ (d) and (e). The provision does not expand the arrest powers codified in § 495(1).

[21] Subsection 495(3) is a police-action-indemnity clause that clothes police conduct with lawful-duty protection, even if an arrest is made contrary to the no-arrest provisions of § 495(2). However, § 495(3) applies only to police who are acting in accordance with § 495(1). An arrest not authorized under § 495(1)

would not receive protection under § 495(3). As with § 495(2), § 495(3) does not work to expand § 495(1) arrest powers.

Application of the law to the evidence—was the arrest lawful?

[22] I will begin by observing that the fact that Ms Kloet did not consent to being arrested is of no moment in this case. An arrest is an exercise of the coercive power of the state to detain people believed to be involved in offence-related activity. People will rarely consent to being arrested. This Court has encountered the no-consent-to-arrest claim in trying unrepresented persons seeking to advance pseudolegal arguments, as well described in *Meads v. Meads*, 2012 ABQB 571. In such cases, defence pleadings typically revolve solely (and mostly ineffectually) around consent and commercial contract, so that unless one has entered into contracts, setting out in writing express consent to being taxed, licensed, governed by traffic signage, obligated to pay for goods or services—or, as in this case, arrested—one may engage in unbounded conduct, free from the restraining effect of the laws of government. Or so the argument goes. People are free to hold these sorts of beliefs, but it must be with the understanding that they are not laws and courts will not apply them. Thus far, Ms Kloet has not advanced any such arguments, at least not directly.

[23] Det/Sgt MacKinnon arrested Ms Kloet based on information from Cst Shipley that she had previously committed the offence of illegal possession of liquor. Det/Sgt MacKinnon did not find her committing that offence.

[24] Accordingly, Det/Sgt MacKinnon did not have a lawful authority to arrest Ms Kloet under either the *LCA* or § 495(1)(b) of the *Code*. The prosecutor has very fairly conceded this point in written argument.

[25] There is no evidence that Det/Sgt MacKinnon turned his mind to the no-arrest provisions of § 495(2) of the *Code*.

[26] The indemnity provisions of § 495(3) of the *Code* are not applicable in this case, as Det/Sgt MacKinnon's arrest of Ms Kloet was not lawful under § 495(1) of the *Code*: the officer did not find Ms Kloet committing an offence.

[27] As noted earlier, an essential element of an offence under ¶ 129(a) of the *Code* is that the officer who was resisted or obstructed was engaged in the lawful execution of his duty; it is that lawful execution of duty that the accused person must have obstructed. If the putative-duty-bound act being executed by an officer is not lawful, then a required external element is unproven.

[28] In Ms Kloet's case, there is good evidence about the duty Det/Sgt MacKinnon was executing when Ms Kloet pulled away: the officer told me he

was arresting her for illegal possession of liquor. It is not possible for the Court to imagine into evidence other inchoate or contemplated duties that the officer might have been considering executing, but did not reveal to the Court. As a trier of fact, I must not engage in speculation.

[29] The prosecution argues that Det/Sgt MacKinnon could have arrested Ms Kloet for obstructing Cst Shipley's arrest of Ms Kloet's friend. The Court makes two pertinent findings on that point: first, Det/Sgt MacKinnon was clear that he arrested Ms Kloet for illegal possession of liquor; second, while it is true that an officer might end up executing a number of duties concurrently or simultaneously when executing a policing action, I am confident that an experienced and senior officer—and Det/Sgt MacKinnon's seniority and experience were well established in his preliminary evidence—would have told the Court what those manifold duties were. Det/Sgt MacKinnon testified to one only: arresting Ms Kloet for illegal possession of liquor. I am confident that Det/Sgt MacKinnon, who had the advantage of being at the very scene, would have told the Court that Ms Kluet was arrestable for obstructing Cst Shipley if he had believed it necessary.

Did Det Sgt MacKinnon arrest Ms Kloet for the wrong charge?

[30] In my view, this is not a wrong-charge situation, notwithstanding the able argument of the prosecution.

[31] Cst Shipley had seen Ms Kloet in possession of liquor, in a public place, outside a licensed area, prior to Det/Sgt MacKinnon arriving on the scene. Based on what he had been told by Cst Shipley, Det/Sgt MacKinnon could have warned Ms Kloet, or he could have issued her a summary-offence ticket. But what he could not do was arrest her for illegal possession of liquor as he did not find her committing that offence. Det/Sgt MacKinnon most certainly had the right charge, but chose the wrong policing action.

[32] And so this is not a case of one officer, fixed with knowledge that would constitute valid grounds for arrest, miscommunicating those grounds to a backup officer, who in turn arrests a suspect for the wrong charge. That sort of situation was the one faced by the court in *R v. Woodruff and Orellana*, 2021 ONSC 7316 at ¶ 39 [*Woodruff*], citing *R v. McCalla*, 2019 ONSC 3256 at ¶ 30-35 [*McCalla*]. But that is not what the Court is dealing with today: Det/Sgt MacKinnon relied entirely and accurately on what Cst Shipley had told him; there was no miscommunication.

[33] Additionally, this case does not involve any *Charter*-grounds issues, whereas *Woodruff* was precisely a *Charter*-grounds case. The issue before the Court today is whether there is any evidence supporting an essential element of an offence, so that there is no *Grant*-factor-balancing wiggle room as would be found in a case involving an exclusion-of-evidence § 24(2) *Charter* application (*ie R v Grant*, 2009 SCC 32 at ¶ 85-86). If there is no evidence covering an essential proof, there is nothing to balance.

[34] The prosecution filed with the Court *R v. Bowers*, 1992 CarswellOnt 3705 [*Bowers*]. That case involved, just as Ms Kloet's, a person charged with resisting arrest. The trial judge found that police would not have had the legal authority to arrest Mr Bowers for the reason offered in court: namely, the violation of a provincial liquor-control statute. The provision that was in play in *Bowers* permitted an arrest of an intoxicated person only if very precise criteria were satisfied, and those criteria were not met. However, the judge found that there would have been grounds to make a lawful arrest to prevent a continuing breach of the peace, as Mr Bowers was in the middle of a mêlée that was under way when police arrived. The trial judge in *Bowers* was prepared to substitute the actual duty being executed by police with an implied or notional one. In my view, this runs contrary to the specific wording of the statute, which

requires proof of the actual duty being executed by the officer who was allegedly resisted or obstructed. It is not for me to say whether *Bowers* was decided correctly, as much turned on the specific facts of the case. It is enough that this Court is not bound by it. I would add that I have not found any cases that have followed it.

Good faith

[35] The prosecution argues that Det/Sgt MacKinnon acted in good faith. That might be so; however, good faith is not a law, nor is it a substitute proof of a lawful duty.

Adjudication of no-evidence issue

[36] I find that there is no evidence before the Court that Det/Sgt MacKinnon was engaged in the lawful execution of his duty when he arrested Ms Kloet for an *LCA* offence.

[37] As that essential element remains unproven at the close of the case for the prosecution, the Court dismisses the charge against Ms Kloet, in accordance with § 804 of the *Code*.

[38] I would note that, although this was adjudicated as a no-evidence issue, the outcome would have been the same had Ms Kloet called evidence. Defence evidence would not have altered the fact that the arrest of Ms Kloet was not lawful.

[39] Finally, this judgment should not be taken as an approval of Ms Kloet's actions. Members of the public place themselves in jeopardy when they inject themselves into policing operations. If a person believes that police have acted improperly, the venue for dealing with that is the court room or a complaints-review tribunal.

Atwood JPC