

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. MacKinnon*, 2014 NSPC 29

Date: 2014-04-30

Docket: 2665115, 2665117,
2665119, 2665121

Registry: Pictou

Between:

Her Majesty the Queen

v.

Joseph Abraham MacKinnon

DECISION APPLICABILITY OF S. 34 OF THE *CODE*

TO A CONDITIONAL-SENTENCE-BREACH HEARING

Judge: The Honourable Judge Del W. Atwood

Heard: 30 April 2014, in Pictou, Nova Scotia

Charge Section 742.6 of the *Criminal Code*

Counsel: Patrick Young, for the Nova Scotia Public Prosecution
Service
Rob Sutherland, for Joseph Abraham MacKinnon

By the Court:

[1] These written reasons amplify the brief oral decision I gave in this case on 30 April 2014.

[2] Joseph Abraham MacKinnon was sentenced by this court on 19 March 2014 to a 15-month conditional sentence order for a theft-spree he had carried out last summer. The next day, 20 March 2014, he was arrested for breaching that order. Mr. MacKinnon denied any wrongdoing. I conducted s. 742.6 breach hearing on 30 April 2014. The court always tries to get these hearings concluded within the 30-day time frame prescribed in sub-s. 742.6(3) of the *Code*; however, in this case, the delay could not be helped due to the limited availability of defence counsel.

[3] The allegation of breach is set out in the report of supervisor before the court in accordance with sub-s. 742.6(4) and it has been received in evidence with the consent of defence counsel in accordance with sub-s. 742.6(5) of the *Code*. The allegation of the supervisor is that Mr. MacKinnon breached the house-arrest condition of the CSO by making an unauthorized stop at a bottle exchange while en route to hospital, and that he breached the keep-the-peace-and-be-of-good-

behaviour condition of the order by assaulting his common-law partner. Mr. MacKinnon denies both allegations.

[4] This decision deals with whether the self-defensive provisions of s. 34 of the *Code*¹ apply to the determination of whether Mr. MacKinnon failed to keep the peace and be of good behaviour, and, if so, who bears the burden of proof and to what standard.

[5] The obligation to keep the peace and be of good behaviour is a mandatory provision of a conditional-sentence order in virtue of para. 742.3(1)(a) of the *Code*. The breaching of a condition contained in a conditional-sentence order may have penal consequences; this is laid out in sub-s. 742.6(9):

(9) Where the court is satisfied, on a balance of probabilities, that the offender has without reasonable excuse, the proof of which lies on the offender, breached a condition of the conditional sentence order, the court may

(a) take no action;

(b) change the optional conditions;

(c) suspend the conditional sentence order and direct

(i) that the offender serve in custody a portion of the unexpired sentence, and

(ii) that the conditional sentence order resume on the offender's release from custody, either with or without changes to the optional conditions; or

(d) terminate the conditional sentence order and direct that the offender be committed to custody until the expiration of the sentence.

¹ In force 15 July 2013 by SI/2013-67, *Can. Gaz., Part II*, 19 June 2013.

[6] Accordingly, the burden on the prosecution in a contested breach hearing is to prove the allegation, but on a balance of probabilities only; further, an offender who defends a breach on the basis of reasonable excuse bears the burden of proving the excuse, also on a balance of probabilities.² A CSO breach hearing has been likened to a bail-revocation hearing under subs-s. 524(3) of the Code.³

[7] The prosecution alleges that Mr. MacKinnon failed to keep the peace by assaulting his common-law partner with a blow to the face while she was driving him to hospital. Defence counsel counters that Mr. MacKinnon ought to be found not to have breached the keep-the-peace condition of his CSO as his conduct was justifiable under s. 34 of the *Code*; he argues that his client's actions in hitting his partner were lawful as he was defending himself from an unprovoked attack.

[8] As I noted earlier, a number of questions are raised in this segment of the hearing. Do the provisions of section 34 of the *Code* apply to breach allegations that involve an element of assault? Is self-defence in a CSO breach hearing a reasonable excuse which must be proven by the offender; or is it a circumstance that must be negated by the prosecution?

[9] Here is my judgment of the issue.

² *R. v. Thompson*, 2014 ONCA 43 at para. 28.

³ *Id.* at para. 29.

[10] Sections 34 and 35 of the *Code* came into force almost a year ago as the comprehensive revision of the true defences of self-defence and defence of property in the General Part. Made away with was the maze that was contained formerly in ss. 34-42, provisions which had been described as “internally inconsistent”,⁴ “complex and confusing”,⁵ as well as “hopelessly confusing and muddled.”⁶ It is the newly amended s. 34 that deals with the justification of self-protective force. Sub-section 34(1) states:

34. (1) A person is not guilty *of an offence* if

(a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;

(b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and

(c) the act committed is reasonable in the circumstances. [Emphasis added.]

[11] This wording seems to suggest that the statutory justification protects only those charged with an offence. But an allegation of a CSO breach is not an offence.⁷ Does s. 34 apply in this case? I believe it does.

⁴ *R. v. McIntosh*, [1991] S.C.J. No. 16 at para. 18.

⁵ *R. v. Pintar*, [1996] O.J. No. 3451 at para. 26 (C.A.).

⁶ Morris Manning & Peter Sankoff, *Criminal Law*, 4th ed., (Toronto:LexisNexis) at 531.

⁷ *Supra*, note 3.

[12] The theory of the prosecution is that Mr. MacKinnon breached the keep-the-peace condition of his CSO by assaulting his common-law partner. That theory is consistent with the principle of legality, as the violation of the criminal law may constitute a violation of the court-ordered condition to keep the peace and be of good behaviour. To be sure, there has been considerable judicial discussion about the breadth of the expression “keep the peace and be of good behaviour”.⁸ However, it is clear from the submissions made by the prosecution that the theory here is that Mr. MacKinnon failed to keep the peace by committing the offence of criminal assault. Such an act, if indeed proven, may constitute a failure to keep the peace.⁹ In deciding whether Mr. MacKinnon breached his CSO by committing the offence of criminal assault, I find that I must apply s. 34; after all, the plain intent of the statute is to help a trier decide whether a person has committed an offence involving the culpable use of force; that is spelled out quite clearly in sub-s. 34(1).

[13] Even if I were to be mistaken on this point, sub-s. 8(3) of the *Code* preserves all common-law defences, not merely as defences to criminal charges but more generally to any “act”. The use of self-protective force in response to unprovoked

⁸ See, e.g., *R. v. Doncaster*, 2013 NSSC 328 at paras. 14-15.

⁹ See, e.g., *R. v. D.R.*, [1999] N.J. No. 228 (C.A.) at para. 13, in which the Court held that “the concept of failure to “be of good behaviour” in the statutory conditions of a probation order is limited to non-compliance with legal obligations in federal, provincial or municipal statutes and regulatory provisions, as well as obligations in court orders specifically applicable to the accused, and does not extend to otherwise lawful conduct even though that conduct can be said to fall below some community standard expected of all peaceful citizens.”

aggression was well recognized as a justification at common law;¹⁰ accordingly, I find that the common-law defence also is available to offenders fending off breach allegations such as the one faced by Mr. MacKinnon.

[14] Who bears the burden of proof—or of disproof—when protective self-defence is raised in a CSO breach hearing. First off, the court must be satisfied, as in a trial, that there is an air of reality to the defence. The reasons for requiring such a minimal threshold are described in *R. v. Cinous*.¹¹ Principally, a court should not be called upon to address any issue—whether it be a defence or a theory of liability—if there is no evidence to support it. However, once there is some evidence before the court that might give effect to a s. 34 defence, then the court should consider it.

[15] What then? Sub-s. 742.6(9) places a burden upon an offender in a CSO breach hearing to prove the existence of a reasonable excuse. In my view, that defence-onus burden of proof is not applicable in these sorts of cases, as protective self-defence is a justification and not an excuse. The distinction between the two was described in *R. v. Perka*.¹² A justification is, in essence, a rightful act which, upon a deontological analysis, would be seen as being in pursuit of a good purpose.

¹⁰ See *R. v. McIntosh*, [1995] S.C.J. No. 16 at para. 62.

¹¹ 2002 SCC 29 at para. 54; see also *R. v. Buzizi*, 2013 SCC 27 at para. 16 .

¹² [1984] 2 S.C.R. 232 at 246.

On the other hand, we reserve excuses for wrongful acts, but which, because of some intervening circumstance—intoxication, factual mistake, mental illness or the like—the law ought not penalize.

[16] The use of reasonable force to defend one's safety is a justifiable act, not one that is merely excused. The burden of proof, then, ought to be borne by the prosecution. The prosecution must negative the application of section 34. That is the way things work in a trial, and there is no principled reason for shifting the burden to the offender in a CSO-breach hearing. As to the standard of proof, it seems only sensible that it match up with the legal standard imposed upon the prosecution for proving the breach itself: specifically, a balance of probabilities.

[17] Based on the facts I have heard in this case, I conclude that there is an air of reality to Mr. MacKinnon's assertion of self-defence as codified in s. 34. The next stage of this hearing will require the court to consider whether the prosecution has negated the application of s. 34 on a balance of probabilities. That concludes my decision on this limited issue.

JPC