**IN THE SUPREME COURT OF NOVA SCOTIA**
**Citation:** R v. Baptist, 2008 NSSC 138

**Date:** 20080508
**Docket:** SH 281444
**Registry:** Halifax

**Between:**

Her Majesty The Queen

Plaintiffs

and

Harrison Baptist

Defendants

**Judge:** The Honourable Justice Arthur J. LeBlanc

**Heard:** October 24, 2007, in Halifax, Nova Scotia

**Counsel:** Joel E. Pink, Q.C., representing the accused
Jennifer MacLellan, representing the Provincial Crown

**By the Court**:

[1] The appellant was convicted by a Provincial Court judge under s. 270 (1)(a) (assaulting a police officer engaged in the execution of duty) and 129(a) (wilfully resisting a police officer engaged in the lawful execution of his duty) of the *Criminal Code*. He now appeals those convictions.

***Relevant statutory provisions***

[2] This appeal involves the *Criminal Code* arrest provisions, as well as the offences of assaulting and wilfully resisting a police officer engaged in the execution of duty. The Crown also relied at trial on the custodial power provided by the provincial *Liquor Control Act*. Section 129 of the *Criminal Code*, R.S.C. 1985, c. C-46, states, in part:

> 129. Offences relating to public or peace officer - 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

> (d) an indictable offence and is liable to imprisonment for a term not exceeding two years, or
>
> (e) an offence punishable on summary conviction.

[3] Section 270 states, in part:

> 270. (1) Every one commits an offence who
>
> (a) assaults a public officer or peace officer engaged in the execution of his duty or a person acting in aid of such an officer;
>
> (2) Every one who commits an offence under subsection (1) is guilty of
>
> (a) an indictable offence and is liable to imprisonment for a term not exceeding five years; or
>
> (b) an offence punishable on summary conviction.

[4] The arrest provision of the *Criminal Code* relied upon by the Crown at trial as authority for the arrest is s. 495(1)(b), which provides authority for an arrest by a peace officer without a warrant:

> 495. (1) Arrest without warrant by peace officer - A peace officer may arrest without warrant
>
> (b) a person whom he finds committing a criminal offence...

[5] The Crown also argued that the constable had authority to take the appellant into custody pursuant to s. 87(2) of the Nova Scotia *Liquor Control Act*, R.S.N.S. 1989, c. 260, which provides:

> 87 ... (2) Where an officer has reasonable and probable grounds to believe a person is in an intoxicated condition in a public place, the officer may, instead of charging the person under the Act, take the person into custody to be dealt with in accordance with this Section.

[6] Also potentially relevant is s. 111(1) of the *Liquor Control Act*, which permits a warrant less arrest in circumstances similar to those described in s. 495(1)(b) of the *Criminal Code*:

> 111 (1) Any inspector, constable or other officer may arrest without warrant any person whom he finds committing an offence against this Act.

## The Trial Decision

### *Facts and evidence*

[7] The trial decision can be found at 2007 N.S.P.C. 13. The issue before the trial judge was "whether the police had the legal authority to arrest or detain Mr. Baptist" (para. 4). At the time of the incident, the appellant, Mr. Baptist, was a first-year student at Dalhousie University. The trial judge reviewed the evidence as follows:

> [5] ... At about 4:30 in the afternoon of Saturday, September 9, 2006, Mr. Baptist went downtown with a number of his friends. He stayed at the Split Crow pub for what he believed to have been about an hour and a half or two hours.
>
> [6] At about 7pm he was outside talking with his friend Laura Rodriquez. They saw a scuffle taking place in the area. Mr. Baptist saw one of his friends being pushed around. He went over to intervene. He saw another one of his friends with a bloody face. Mr. Baptist described the situation as being "intense".
>
> [7] Mr. Baptist then somehow ended up in a pushing and shoving match with one of the staff members from the pub. He did not elaborate on how his interaction with the bouncer or waiter escalated into physical confrontation.

[8] Douglas Shippien is a member of the staff at the Split Crow. He described Mr. Baptist that evening as walking around looking for someone to fight and picking fights with "anyone who looked at him". Mr. Shippien testified that he saw Mr. Baptist holding another male when a third person reached over and punched the person being held. There was no suggestion that Mr. Baptist had been holding the person for that purpose and the third party seemed to have not been acting in concert with Mr. Baptist.

[9] Mr. Shippien's description of events was generally confirmed by another member of the pub staff, Dennis Coolen. Mr. Coolen said that Mr. Baptist was "mouthing off" and kept challenging him and refusing to back down. He described Mr. Baptist as drunk or intoxicated.

[10] The waiter or bouncer, according to Mr. Baptist, accused him of having held another person while someone else punched and knocked out the person being held. Mr. Baptist acknowledged that at the time he was upset that he had been accused of something he had not done. Though he was upset he said that he was "basically sober".

[11] Amid the noise of the crowd it became clear that the police had been called. Mr. Baptist and others thought it wise to leave. He, Laura Rodriquez and another friend, Luke Wilson, left travelling along Granville St. They turned up George St. heading toward Barrington St. and there they were confronted by Constable Tortola in the marked police van.

[12] Constable Tortola had been advised that the person fitting Mr. Baptist's description had been involved in an assault. Constable Tortola came toward the group. As described by Mr. Baptist, the constable said nothing about his being under arrest.

[13] Mr. Baptist agreed however that he did assume that Constable Tortola was approaching them about his alleged involvement with holding the person who had been punched. Mr. Baptist knew that he had been implicated whether fairly or not by the staff at the pub. Laura Rodriquez also confirmed that she knew that the police were looking for Mr. Baptist specifically about that incident.

[14] Constable Tortola's evidence was that as he approached Mr. Baptist he smelled a moderate smell of alcohol from him. He informed Mr. Baptist that he was investigating an assault. He told him that he was under arrest for being drunk in a public place. At that point, according to Constable Tortola, Mr. Baptist put his back to the wall of a building and placed his hands in an aggressive fighting stance. Constable Tortola said that Mr. Baptist swung his right hand at the constable' s face. There was a struggle. Mr. Baptist pushed the officer and ripped the pocket of his uniform shirt. Constable [Tortola] described Mr. Baptist as being very combative and moderately intoxicated.

[15] Constable [Tortola] was assisted by Sergeant Lowther, who arrived at the same time in a marked police cruiser. He said that he saw Constable Tortola approach Mr. Baptist, advise him that he was under arrest for being intoxicated in a public place and that the constable was investigating the assault that had taken place at the Split Crow. He saw Mr. Baptist take a swing at Constable Tortola, became involved in the struggle and saw Mr. Baptist push Constable Tortola and rip his shirt in the process.

[16] Mr. Baptist's evidence was that Constable Tortola simply said "Stop", and then grabbed Mr. Baptist's neck. Mr. Baptist said that he then "took his (Constable Tortola's) hand off my neck".

[17] Ms. Rodriquez confirmed that she saw Mr. Baptist push the police officer though she did not witness him take a swing at the officer. She heard nothing about an arrest.

[18] Mr. Wilson recalled Mr. Baptist asking why he was being placed under arrest.

[19] Mr. Baptist was only subdued when Mr. Shippien, from the Split Crow arrived to assist. Mr Baptist was placed in the police van and taken to the police station. He was held for 8 hours. Mr. Baptist acknowledged that he was very upset and while at the police station did bang his head against the plexiglass window in the holding cell area to get someone's attention, because his hands were cuffed behind his back. The police witnesses described him as being out of control.

> [20] He was not asked anything further about the assault at the Split Crow and was not charged with any offences arising from it.

## The trial judge's findings

### *Authority to arrest*

[8] The *Criminal Code* describes the circumstances in which a police officer can make an arrest at s. 495, which, to repeat, provides:

> 495. (1) Arrest without warrant by peace officer - A peace officer may arrest without warrant
>
> (b) a person whom he finds committing a criminal offence....

[9] In analyzing the Crown's submission that the arresting officer had authority to arrest the appellant under s. 495(1)(b) of the *Criminal Code*, the trial judge referred to the interpretation of that provision in *R.* v. *Biron*, [1975] 2 S.C.R. 56. In that case the majority accepted that the arresting officer is required only to find a person "apparently" committing an offence in order to make an arrest.

[10] According to the trial judge's reading of *Biron*, the word "apparently" meant that "the officer may arrest a person who is not actually committing an offence but who reasonably appears to be committing an offence even though subsequently it is determined that the person was not committing an offence" (para. 31). The trial judge rejected the view that s. 495(1)(b) authorizes an arrest only where the officer finds a person committing an act that is criminal "on its face ... observed by the unaided senses," so that commission of an offence would be apparent "only if it is manifest or clear from observation without further information" (para. 31). He concluded, with reference to *Biron*:

> [31] ... The court noted that the police cannot determine that an offence is taking place and can really only determine that an offence is apparently taking place. The word "apparently' as used in the *Biron* decision is intended to indicate that the final determination as to whether an offence was taking place does not determine whether an offence was apparently being committed. *Biron* does not mean that in order to observe an offence being committed the police must rely on unaided powers of observation and that they must dismiss from their consideration any other information that they have obtained.

[11] The trial judge held that Constable Tortola had reasonable and probable grounds for an arrest under s. 495(1)(b) for the ongoing offence of public intoxication, on the strength of "his brief observation [of Mr. Baptist walking up the street] and the information which there was no reason to believe was unreliable..." (para. 32). For similar reasons, the trial judge held that Cst. Tortola

was also authorized to arrest the appellant for being intoxicated in a public place pursuant to s. 87(2) of the *Liquor Control Act* (para. 34).

***Authority to detain for investigation***

[12] The trial judge also concluded that Constable Tortola was authorized to detain the appellant in order to investigate the alleged assault, pursuant to *R.* v. *Mann*, [2004] 3 S.C.R. 59, in which the court recognized a limited common law investigative detention power. The trial judge held that, in the circumstances, it was reasonable for the officer to approach the appellant and to seek to detain him in order to investigate the assault, at least to the extent of asking questions (para. 40). The appellant's "physically aggressive response," however, "took the matter to another level of seriousness" (para. 41). He knew, when Constable Tortola approached him, that the officer was "just trying to do his job" by investigating the accusation by pub staff that he had been involved in an altercation at the Split Crow (para. 42). The trial judge came to the following conclusions:

> [43] Mr. Baptist's recollection of the event had Constable [Tortola] placing his hand on Mr. Baptist's neck and Mr. Baptist removing it. Moments earlier outside the pub, Mr. Baptist had been involved in an intense situation. That involved pushing and shoving the bar staff and intervening in the fight that was taking

place. Moments later Mr. Baptist was struggling against two police officers and was subdued only when one of the staff from the pub arrived to assist. Given what had happened immediately before and immediately after, Mr. Baptist' s description of his first interaction with Constable Tortola does not convey the full flavour of the event. I do not believe that he calmly "removed" Constable Tortola's hand from his neck. His aggressive stance and aggressive actions at this stage started the chain of events leading to the escalation of the matter.

[44] Mr. Baptist's action meant that practically, questioning him about the assault became a much lower priority. Constable Tortola was not looking for Mr. Baptist because he thought he was drunk. He was looking for Mr. Baptist because someone had been assaulted and Mr. Baptist had been directly implicated. His detention for that purpose was far from an afterthought but was the constable's primary objective in speaking with Mr. Baptist.

[45] We do not know what would have happened had Constable Tortola been able to [simply] ask some questions about Mr. Baptist's involvement in the incident outside the Split Crow. We only know that he put his hand on Mr. Baptist and before he had a chance to ask anything Mr. Baptist, knowing that the police were looking for him about the assault, took a physically aggressive stance and then struck the officer. At that point, further questioning was not the issue.

[46] The fact that no further questions were asked about the assault and the fact that Mr. Baptist was not charged with any offence related to the incident at the Split Crow do not change the fact that he was being sought for questioning about that incident. That was the reason why the police were dispatched and the reason why Constable Tortola approached him in the first place.

***The trial judge's disposition***

[13] The trial judge held that there were reasonable grounds for arrest – both under the *Criminal Code* and the *Liquor Control Act* – based on the description provided by the pub staff and the allegation that the appellant had been involved in a criminal assault. There was also authority for the officer to detain the appellant in order to investigate the alleged assault. Knowing that he had been accused of assault, and that the officer was approaching him in relation to that allegation, the appellant was not entitled to physically resist arrest. The officer was acting in the performance of his duty, and the appellant was not obligated to answer any questions he might be asked, although he could have asserted his innocence. As such, the trial judge found the appellant guilty on both charges (paras. 47-50).

***Grounds of Appeal***

[14] The notice of appeal sets out 17 grounds of appeal, which the appellant condenses in his factum. The appellant claims that (I paraphrase):

> The verdict of the trial judge is unreasonable and unsupported by the evidence in that the trial judge made findings of act not based on the evidence;

> The trial judge erred in law in holding that Cst. Tortola was engaged in the lawful execution of his duty when the appellant was arrested and/or detained for a violation of s. 87 of the *Liquor Control Act*;
>
> The trial judge erred in law in interpreting s. 495(1)(b) of the *Criminal Code* and in applying *R.* v. *Biron*, *supra*;
>
> The trial judge erred in law in interpreting s. 87(2) of the *Liquor Control Act*;
>
> The trial judge erred in law in holding that there was a proper detention for investigative purposes and in holding that the word "stop" is equivalent to "detention";
>
> The trial judge erred in law by not applying *R.* v. *W.(D.)*, [1991] 1 S.C.R. 742, and in not giving reasons for rejecting the evidence of the appellant and the defence witnesses.
>
> The trial judge erred in law in failing to apply the principles of burden of proof and proof beyond a reasonable doubt, and in holding that Cst. Tortola made a proper detention for investigative purposes when he said to the appellant, "stop for investigation into an assault."

[15] The scope of review of a summary conviction appeal court judge was set out in *R.* v. *Nickerson* (1999), 178 N.S.R. (2d) 189 (C.A.), as follows, at para. 6:

> The scope of review of the trial court's findings of fact by the Summary Conviction Appeal Court is the same as on appeal against conviction to the Court of Appeal in indictable offences.... Absent an error of law or a miscarriage of justice, the test to be applied by the Summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence. As stated by the Supreme Court of Canada in *R.* v. *Burns (R.H.)*, [1994] 1 S.C.R. 656 ... at p. 657, the appeal court is entitled to review the

> evidence at trial, re-examine and reweigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions. If it is, the Summary Conviction Appeal Court is not entitled to substitute its view of the evidence for that of the trial judge. In short, a summary conviction appeal on the record is an appeal; it is neither a simple review to determine whether there was some evidence to support the trial judge's conclusions nor a new trial on the transcript.

***Findings of fact not based on evidence***

[16] The appellant says there is no evidence that Cst. Tortola was ever told that the appellant was "drunk and belligerent." The appellant says the evidence shows that Cst. Tortola made the arrest based on his own observation that there was a moderate smell of alcohol coming from him (transcript, p. 40, 49-50).

[17] The Crown says the evidence is reasonably capable of supporting the trial judge's conclusions respecting the arrest under the *Liquor Control Act*. The Crown says Cst. Tortola was told of behaviour by the appellant that could be considered "drunk and belligerent," referring to Mr. Coolen's evidence that he described the appellant to the police as the person who was holding the person who was knocked out and "as a person who is very excited and challenging me and my authority as a waiter and peacekeeper at the situation...." In the context of the evidence as a whole, the Crown submits, the trial judge could infer that Cst. Tortola was

informed that the appellant was “drunk” (as Mr. Coolen described him in his testimony, defining “drunk” as “[o]verly loud, not using an indoor voice, being very aggressive, excited....”). The Crown adds that Mr. Shippien, in his evidence, stated that the police were told “what was going on and who was ... one of the major instigators in it.” The combined effect of what he was told about the appellant’s appearance, actions and demeanor, coupled with his own observations, resulted in a valid arrest under the *Liquor Control Act*, the Crown says. The Crown says it would be reasonable for Cst. Tortola, and the trial judge, to conclude that the appellant was intoxicated in these circumstances.

[18] Whether or not the staff members used the words “drunk” or “intoxicated,” I am satisfied that the trial judge could reasonably conclude that Cst. Tortola was able to rely on all the circumstances – including what he was told and what he observed – to come to the conclusion that the appellant was publicly intoxicated. I am satisfied that this was a conclusion open to the trial judge in the context of all the evidence.

***Application of the Liquor Control Act***

[19] The appellant submits that Cst. Tortola was not engaged in the lawful execution of his duty when he arrested the appellant under the *Liquor Control Act*. The apparent basis for this submission is a line of case law supporting a relatively demanding assessment of "intoxication." For example, in *Foster* v. *Morton* (1956), 4 D.L.R. (2d) 269 (S.C. *in banco*) Ilsley C.J.N.S. appeared to accept that the condition of intoxication meant, in some circumstances at least, "being stupefied or disordered in intellect with alcoholic liquor..." (p. 272). In *R.* v. *Legrandeur*, 2004 Carswell BC 3112; 2004 BCPC 489, where the accused was charged with assaulting a police officer in the execution of her duty, the court said:

> 8 Was she in the execution of her duty? Section 41(2) of the *Liquor Control and Licensing Act* allows a peace officer to arrest without warrant a person found intoxicated in a public place. But Mr. Bethell cited several cases establishing that the word "intoxicated" in this context has been interpreted to mean an extremely high level of drunkenness. For example, in *R.* v. *Wallace* [1998 Carswell BC 2688 (B.C. S.C.)] the case refers to intoxicated meaning "the condition of being stupefied or drunk from the consumption of alcohol or a drug to such a marked degree," and I emphasize these next words, "that the person is a danger to himself or others or is causing a disturbance."
>
> 13 I find that the officer was in the execution of her duty, that she had the right to arrest Mr. Lagrandeur for being drunk in a public place....

[20] The appellant adds that Cst. Tortola did not have reasonable and probable grounds to believe that the appellant was intoxicated in a public place, as would be required to take him into custody pursuant to s. 87(2) of the Act. In *R.* v. *Storrey*, [1990] 1 S.C.R. 241, Cory J., for the court, confirmed that "reasonable grounds" has both an objective and a subjective aspect. He said, at pp. 250-251:

> There is an additional safeguard against arbitrary arrest. It is not sufficient for the police officer to personally believe that he or she has reasonable and probable grounds to make an arrest. Rather, it must be objectively established that those reasonable and probable grounds did in fact exist. That is to say a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest....

[21] In summary then, the *Criminal Code* requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a prima facie case for conviction before making the arrest.

[22] The appellant says no reasonable police officer would conclude that a person had violated s. 87 on the strength of a "moderate" smell of liquor, adding that (as noted) above, the evidence observed by the officer falls short of "intoxication" as it has been described in the case law. The appellant also claims that the trial judge erred in considering that Cst. Tortola had been told that the appellant was intoxicated when he had not actually been told this.

[23] The Crown says the *Liquor Control Act* does not require the accused to be incapacitated by alcohol in order for an arrest to be valid. The question, the Crown says, is not whether the appellant could be convicted under the Act, but only whether the arresting officer had sufficient grounds for the arrest, which, the Crown submits, the trial judge reasonably found that he did.

[24] The Crown also says s. 87 is not solely targeted at situations where the intoxicated person is unable to take care of themselves, but also encompasses situations where that person is a danger to other persons: see *R.* v. *Roberts (Z.C.)* (2003), 236 Sask. R. 1 (P.C.). The Crown also refers to the definition of "public intoxication" in *Black's Law Dictionary*, 6th edn. (1990), where the phrase is defined, at p. 822, as;

> being on a highway or street or in a public place or public building while under the influence of intoxicating liquor, narcotics or other drug to the degree that one may endanger himself or other persons or property, or annoy persons in his vicinity.

[25] The Crown says the evidence before the trial judge established that the appellant was drunk by these standards, both at the Split Crow and during the encounter with the police. The Crown says all the elements of the appellant's behaviour that were reported by the Split Crow personnel were still present when the appellant was stopped by Cst. Tortola and Sgt. Lowther. It was not necessary to prove the appellant's guilt in order to arrest him; it was only necessary that he was apparently committing the offence of public intoxication. In summary, the Crown says, Cst. Tortola had reasonable and probable grounds to arrest the appellant.

[26] While there has been no suggestion that the appellant was intoxicated to the degree contemplated by *Foster* and *Legrandeur*, there is equally no compelling reason to conclude that this is what is required under s. 87(2) in order to provide reasonable and probable grounds to believe that a person is intoxicated. I am not satisfied that the trial judge erred in considering that Cst. Tortola was acting in the

execution of his duty pursuant to the *Liquor Control Act* when he concluded that the appellant was apparently committing the offence of public intoxication.

***The trial judge's interpretation of s. 495(1)(b) and Biron***

[27] The appellant argues that the trial judge erred in his application of *Biron* to the interpretation of s. 495(1)(b) of the *Criminal Code*. The facts in *Biron* were set out by Martland J, for the majority, at p. 69:

> The Montreal police made an authorized raid on a Montreal bar on October 24, 1970. The raid was in search of illegal firearms and liquor. Biron was at the bar while the raid was taking place. He had been drinking. He refused to co-operate with the police, verbally abusing them and refusing to give his name.

[28] Biron was arrested inside the restaurant by Constable Maisonneuve. He was led outside by Constable Gauthier for questioning. He was handed over by Constable Gauthier to Constables Dorion and Marquis, who took him to a police car. Subsequently, Constable Dorion tried to take him to the police wagon. Biron protested his arrest at this point and a scuffle with Constable Dorion occurred.

[29] Biron was charged with creating a disturbance in a public place by shouting, contrary to s. 171(a)(I) of the Code (then s. 160(a)(I)). He was also charged with resisting a peace officer, as previously mentioned.

[30] Biron claimed that he was not under lawful arrest and was therefore entitled to resist, because Constable Maisonneuve's right to arrest him for a summary conviction offence under what is now s. 495(1)(b) required the officer to find him committing a criminal offence, whereas he had been acquitted of the charge. Martland J. distinguished between paras. (a) and (b) of the arrest provision, at pp. 71-72:

> Paragraph (a) of s. 450(1) permits a peace officer to arrest without a warrant:
>
> > (a) a person who has committed an indictable offence or who, on reasonable and probable grounds, he believes has committed or is about to commit an indictable offence,

[31] This paragraph, limited in its application to indictable offences, deals with the situation in which an offence has already been committed or is expected to be committed. The peace officer is not present at its commission. He may have to

rely upon information received from others. The paragraph therefore enables him to act on his belief, if based on reasonable and probable grounds.

[32] Paragraph (b) applies in relation to any criminal offence and it deals with the situation in which the peace officer himself finds an offence being committed. His power to arrest is based upon his own observation. Because it is based on his own discovery of an offence actually being committed there is no reason to refer to a belief based upon reasonable and probable grounds.

[33] If the reasoning in [*Attorney General for Saskatchewan* v. *Pritchard* (1961), 34 W.W.R. 458.] is sound, the validity of an arrest under s. 450(1)(b) can only be determined after the trial of the person arrested and after the determination of any subsequent appeals. My view is that the validity of an arrest under this paragraph must be determined in relation to the circumstances which were apparent to the peace officer at the time the arrest was made.

[34] The appellant submits that the trial judge erred in law when he concluded that Cst. Tortola was entitled to consider “his own observations and reliable statements of others in making the determination as to whether an offence is

apparently taking place." He had, it is argued, no reasonable and probable grounds to believe that the appellant was committing an offence – including the offence of public intoxication – based on his observation of the appellant walking up the street and noting a moderate smell of alcohol from the appellant.

[35] The Crown refers to *R.* v. *Vance*, [1979] Y.J. No. 7 (Yukon C.A.), where it was held that the arresting party did not require personal knowledge of every element of the offence, but could draw inferences from the circumstances to conclude that the accused was apparently committing the offence.

[36] There is some basis to conclude that the trial judge read the meaning of "apparently" quite widely. As noted above, the view of the majority in *Biron* was that the power to arrest under s. 495(1)(b) arises when the officer "finds an offence being committed. His power to arrest is based upon his own observation. Because it is based on his own discovery of an offence actually being committed there is no reason to refer to a belief based upon reasonable and probable grounds" (*Biron*, p. 72). However, *Biron* does not appear to exclude reliance upon inferences when an officer makes an arrest under s. 495(1)(b), and the appellant does not offer authority to suggest that inferences should be excluded.

[37] It should be noted, with respect to the available powers of arrest, that it is not clear that s. 495(1)(b), with its reference to "criminal" offences, is an appropriate source of arrest powers for a violation of the *Liquor Control Act*. It is possible that s. 111(a) of the *Liquor Control Act*, authorizing an officer to arrest without warrant "any person whom he finds committing an offence against this Act" is the proper source of the arrest power.

***Investigative detention***

[38] The appellant says the trial judge misinterpreted the distinction between "detention for investigative purposes" and "arrest for investigative purposes." An arrest by a police officer, it is submitted, can only be authorized by the *Criminal Code*, specifically s. 495. Detention for investigative purposes, however, is a common law doctrine. A person who is "detained for investigative purposes" has not been arrested. Iacobucci J. summarized the law on detention for the majority in *Mann*, *supra*, at para. 45:

> To summarize, ... police officers may detain an individual for investigative purposes if there are reasonable grounds to suspect in all the circumstances that

> the individual is connected to a particular crime and that such a detention is necessary. In addition, where a police officer has reasonable grounds to believe that his or her safety or that of others is at risk, the officer may engage in a protective pat-down search of the detained individual. Both the detention and the pat-down search must be conducted in a reasonable manner. In this connection, I note that the investigative detention should be brief in duration and does not impose an obligation on the detained individual to answer questions posed by the police. The investigative detention and protective search power are to be distinguished from an arrest and the incidental power to search on arrest....

[39] The appellant submits that, in order to detain a person for investigative purposes, the police officer must inform the person, "I am detaining you for investigative purposes," not "I am arresting you for investigative purposes."

[40] The Crown says the trial judge's application of *Mann* to the facts accorded with other cases applying *Mann* in Nova Scotia. For instance, in *R.* v. *Scott*, [2004] N.S.J. No. 451 (C.A.), the police detained two suspects whose vehicle matched the description of the one used by the perpetrators of a robbery. They were searched, but not arrested for half an hour. The Court of Appeal upheld the detention, Fichaud, J.A. noting that "[t]he threshold for a detention is lower than for an arrest" (para. 35).

[41] In a passage the Crown suggests is relevant to the present facts, MacDonald A.C.J.S.C. (as he then was) said, in *R.* v. *Boyce*, [2004] N.S.J. No. 493:

> 27 As the authorities suggest, the context of each case must be carefully considered. Doherty J.A. in [*R.* v. *Simpson* (1993), 20 C.R. (4th) 1 (Ont. C.A.)]... emphasized the importance of context and how the nature of the detention should be commensurate to the facts:
>
> > If articulable cause exists, the detention may or may not be justified. For example, a reasonably based suspicion that a person committed some property-related offence at a distant point in the past, while an articulable cause, would not, standing alone, justify the detention of that person on a public street to question him or her about that offence. On the other hand, a reasonable suspicion that a person had just committed a violent crime and was in flight from the scene of that crime could well justify some detention of that individual in an effort to quickly confirm or refute the suspicion. Similarly, the existence of an articulable cause that justified a brief detention, perhaps to ask the person detained for identification, would not necessarily justify a more intrusive detention complete with physical restraint and a more extensive interrogation. [Emphasis by Crown]

[42] In this case, the Crown says, the police had more than a reasonable suspicion; there were eyewitnesses who described the accused and directed the police where they had gone.

[43] The Crown also refers to *R.* v. *Cooper*, [2005] N.S.J. No. 102 (C.A.), where the police detained, then arrested, the accused, who fled by vehicle and then on foot after trying to evade a random traffic stop. Fichaud J.A., in affirming that the use of investigative detention was reasonable, said:

16 The trial judge found that, though Constable Chediac did not have reasonable grounds to arrest Mr. Cooper, he had a reasonable basis to detain Mr. Cooper under the first prong of the *Waterfield* [*R.* v. *Waterfield*, [1963] 3 All E.R. 659] test:

> The actions of the passenger, Mr. Cooper, in my view, provided Cst. Chediac reasonable grounds to detain, especially the actions which followed. Mr. Cooper bailed out of the vehicle, fled into residential backyards and into a parking lot and then into the foyer of a security apartment to which he could not gain entrance then secreted himself in a nook of that foyer which could not be seen by the officer.
>
> I am satisfied that the police officer was acting reasonably when he took up the chase of Mr. Cooper and would have been ignoring his duty to prevent crime and protect property if he had let Mr. Cooper run into the backyards and into the apartment building without pursing him.

17 The second prong of the *Waterfield* test, restated by Justice Iacobucci in *Mann*, requires that the court consider whether the extent of the detention was proportionate to the requirements of the police officer's duties. The trial judge ruled that Mr. Cooper's detention was proportionate:

> The behaviour of the accused, in my view, merited his being handcuffed and being brought to the area where there were other police officers to do the protective search.
>
> His previous attempt to evade the police merit that precautions be taken to prevent further flight, and that includes the search for weapons while the officer placed him in the car.
>
> In this case, based on the evidence that I have before me, I conclude that Cst. Chediac was acting within the general scope of

> his duty in pursuing and detaining Mr. Cooper, and that the initial detention of Mr. Cooper was proportionate in restraint to the circumstances that were being encountered.
>
> The use of handcuffs, the removal of Mr. Cooper from the apartment building and the officer's safety search of Mr. Cooper in my view were all justifiable in the circumstances.
>
> In my view, the interference of Mr. Cooper's liberty and the nature and the extent of the interference survives assessment in all the circumstances of that particular morning.

[44] Fichaud J.A. went on to consider, once again, the distinction between arrest and detention, at para. 43:

> As discussed earlier ..., the standard of reasonableness for detention differs from the standard for an arrest under s. 495(1) of the Code (*Mann* para. 27; [*R.* v. *Greaves*, [2004] 189 C.C.C. (3d) 305 (B.C.C.A.)], para. 41). The difference is reflected in the different wordings used in s. 495(1) for an arrest and the Supreme Court's formulation for detention. Section 495(1) states that there must be reasonable grounds that the accused "committed" or is "about to commit" an indictable offence or has been found "committing" a criminal offence. For detention, it is sufficient if there is a "clear nexus" or "connection" between the individual and the recent or current offence, or that the individual is "implicated in the criminal activity" (*Mann* paras. 34 and 45). The different wordings recognise that the police power of detention, limited though it may be, is an investigative and not necessarily a charging power. The "nexus", "connection" or "implication" acknowledges that, at this investigatory stage, there may be a margin, spanned by the connection, between the individual and commission of the offence.

[45] Holding that this was not “a case of police using a general power of detention to satisfy their curiosity” and that the accused “fled from a reasonably

suspected offence, and his flight gave to the police an objective basis to suspect that he was connected to that offence" (para. 47), the court noted, at paras. 50-51:

> The trial judge concluded that, when Cst. Chediac took up the chase and then detained Mr. Cooper, the officer was acting in the course of his duty. I agree. Cst. Chediac's police duties, at common law, included:
>
> > ... the preservation of the peace, the prevention of crime, and the protection of life and property.
>
> *Dedman*, at p. 32; *Mann*, at para. 26. Cst. Chediac's chase and detention of Mr. Cooper were within the scope of those duties.

[46] The trial judge concluded that the detention was proportionate to the requirements of Cst. Chediac's police duties. There is no error in that conclusion....

[47] Similarly, the Crown, submits, Cst. Tortola would still have been acting in the execution of his duty if his only basis for the detention was to investigate the events at the Split Crow. There was a geographic and temporal nexus between the appellant and the Split Crow incident. The Crown submits that, in circumstances where the accused was implicated in a violent crime occurring moments before, and was not responding to the police, the officers acted in execution of their duty.

[48] The Crown submits that the appellant's references to *R.* v. *O'Donnell and Cluett* (1982), 55 N.S.R. (2d) 6 (C.A.) in support of the proposition that an officer must inform a detained person that he is being detained for investigative purposes, rather than arrested, is no longer good law in view of *Mann*.

[49] According to the appellant, by not advising him that he was being detained, Cst. Tortola breached the his right under s. 10(a) of the *Charter of Rights and Freedoms* "to be informed promptly of the reasons" of his arrest or detention. As Iacobucci J. said in *Mann*, s. 10(a) requires "[a]t a minimum" that "individuals who are detained for investigative purposes must therefore be advised, in clear and simple language, of the reasons for the detention" (para. 21). The Crown says the appellant has not properly placed the *Charter* arguments before the court, as the *Charter* was not relied upon at trial and no *Charter* notice was given prior to trial.

[50] In addition, the appellant argues that because he was not actually asked any questions about the events at the Split Crow, there was, in fact, no detention for investigative purposes. The Crown denies that the detention could be retroactively rendered invalid by the fact that the appellant was not questioned about the events at the Split Crow, nor charged with any offences arising therefrom. The Crown

refers to *Storrey* for the principle that a police investigation can properly continue after arrest, as against any suggestion that a lawful arrest should be considered improper where the police intend to do further investigation.

***R.* v. *W.(D.); reasons for rejecting evidence***

[51] The appellant submits that the trial judge erred in law by not applying *R.* v. *W.(D.)*, [1991] 1 S.C.R. 742. In that case, Cory J., for the majority, considered the manner in which a trial judge is required to address a jury with respect to the burden of proof. He said:

> In a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses. Specifically, the trial judge is required to instruct the jury that they must acquit the accused in two situations. First, if they believe the accused. Second, if they do not believe the accused's evidence but still have a reasonable doubt as to his guilt after considering the accused's evidence in the context of the evidence as a whole....

[52] Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[53] The *W.(D.)* analysis is also applied by a judge sitting without a jury; see, for instance, *R.* v. *Garland*, 2006 NSCA 39.

[54] The appellant points to the testimony of Cst. Tortola, who stated on cross-examination that he had arrested the appellant for investigative purposes. The transcript reads, in part:

> **A**. ... At that time, I began to approach him [the appellant], informing him that he was being stopped for investigation into an assault.... [p. 40]
>
> **Q.** ... At no time did you say you're under arrest for investigative purposes, did you?
>
> **A**. Yes, I did.
>
> **Q**. I thought you said you just said stop.

**A**. Yes, that's what I ...

**Q**. You didn't place him under arrest for investigative purposes.

**A**. Yes, I did. [pp. 48-49]

[55] In addition, Sgt. Lowther testified as follows on cross-examination:

**Q**. And you heard him even before he placed a hand on Mr. Baptist that he was under arrest for Section 87 of the **Liquor Control Act**.

**A**. Yes, sir.

**Q**. And in fact, that was the only thing that he was placed under arrest for, is that not correct?

**A**. He was also explaining that he was ... I don't remember the exact words, but I know there was an indication that he was investigating an assault that had just occurred at the Split Crow, and you're also under ... and then he started swinging.

**Q**. Yeah. But he never placed him under arrest for investigative purposes, did he?

**A**. I don't recall the actual ... I know the 87, the **Liquor Control Act**, and I know there was conversation about the assault. I don't know if he actually said you're under arrest for assault, or if it was you're under investigation of an assault.

[56] The trial judge noted the appellant's evidence that "the constable said nothing about his being under arrest." According to the appellant, the trial judge

did not clearly accept or reject this evidence, nor the evidence of Ms. Rodriguez and Mr. Wilson.

[57] In support of the submission that the trial judge did indeed apply *R.* v. *W.(D.)*, the Crown says the trial judge did reject the appellant's evidence as to what happened when he was stopped by the officers. The Crown refers to the following passage, found at para. 43 of the trial judge's decision:

> Mr. Baptist's recollection of the event had Constable Tortola placing his hand on Mr. Baptist's neck and Mr. Baptist removing it. Moments earlier outside the pub, Mr. Baptist had been involved in an intense situation. That involved pushing and shoving the bar staff and intervening in the fight that was taking place. Moments later Mr. Baptist was struggling against two police officers and was subdued only when one of the staff from the pub arrived to assist. Given what had happened immediately before and immediately after, Mr. Baptist' s description of his first interaction with Constable Tortola does not convey the full flavour of the event . I do not believe that he calmly "removed" Constable Tortola's hand from his neck. His aggressive stance and aggressive actions at this stage started the chain of events leading to the escalation of the matter. [Emphasis by Crown]

[58] The Crown adds that this is not a case where *W.(D.)* actually applies, because the *W.(D.)* analysis is directed at the ultimate proof of guilt rather than individual findings of fact. In rejecting the appellant's evidence, as to what happened when he was approached by Cst. Tortola, the Crown says, the trial judge addressed the only aspect of the case where credibility was an issue.

[59] It is clear that a trial judge is not required to formally recite the *W.(D.)* language. In *R.* v. *Lake (P.E.)* (2005), 240 N.S.R. (2d) 40 (C.A.) Fichaud J.A. said, for the court:

> [14] ... It is fundamental that, when the verdict turns on the accused's credibility, the trial judge's reasons should disclose whether she believes or disbelieves the accused.
>
> [15] *D.W.* dealt with a jury charge. A judge alone is presumed to know the basic principles of law governing reasonable doubt which need not be recited mechanically in every decision. Her decision may operate within a flexible ambit. She need not quote phraseology from D.W., follow the D.W. chronology or even cite D.W. The question for the appeal court is whether, at the end of the day and upon consideration of the whole of the trial judge's decision, it is apparent that she did not apply the essential principles underlying the D.W. instruction....

[60] In *Lake* the trial judge did not expressly reject the evidence of the accused, but did expressly accept certain evidence of the Crown witnesses: *Lake* at para. 7. The Court of Appeal allowed the appeal and ordered a new trial, stating that the trial judge "did not expressly or impliedly answer the first *D.W.* question. The accused's credibility is a basic trial issue which should not be assessed for the first time in the Court of Appeal" (para. 29). Similarly, in *R.* v. *D.D.S.* (2006), 242 N.S.R. (2d) 235 (C.A.) the Court of Appeal allowed the appeal in part because "the

trial judge never said he rejected the appellant's evidence. One ought not to infer that he did so by necessary implication" (para. 44).

[61] In the present case, the trial judge clearly made a finding as to how matters proceeded when Cst. Tortola placed a hand on the appellant's neck; he said, at para. 45:

> [g]iven what had happened immediately before and immediately after, Mr. Baptist' s description of his first interaction with Constable Tortola does not convey the full flavour of the event . I do not believe that he calmly "removed" Constable Tortola's hand from his neck. His aggressive stance and aggressive actions at this stage started the chain of events leading to the escalation of the matter.

[62] These comments address the trial judge's view on the "resisting arrest" aspect of the exchange. They do not indicate anything further about his general conclusions on credibility, nor do they offer explicit conclusions as to what the trial judge concluded as to the events leading up to the physical altercation, and, in particular, what the appellant was told about the reasons for his arrest or detention. That being said, there is a strong basis to conclude that the trial judge implicitly rejected the appellant's evidence that he was not told he was being arrested for an offence under the *Liquor Control Act*. There was evidence from the police

witnesses that he was told he was being arrested under the *Liquor Control Act*, and the trial judge referred to evidence offered on the appellant's behalf that was contrary to this. He then concluded that the appellant was validly arrested under the Act. While it might have been preferable for the trial judge to state this explicitly, I believe it is impossible to come to any other conclusion.

***Sufficiency of reasons***

[63] If it appears that the trial judge did reject the defence evidence, the appellant submits, the trial judge erred by not giving reasons. The appellant refers to *R.* v. *A. (J.J.)*, 1990 CarswellNWT 26 (N.W.T.S.C.), where the court said:

> 13 While I cannot say that the trial judge was wrong to reject the appellant's denial or to fail in articulating express reasons for doing so, given all the circumstances, I think I would be remiss if I did not emphasize the usefulness and frequently the importance of stating reasons where significant elements of testimony are rejected. As noted in *R. v. Tonelli* at p. 347, the following passage from *Clark* v. *McCrohan*, [1948] O.W.N. 172, [1948] 2 D.L.R. 283 at 286 (C.A.), states the prudent course to be followed:
>
> > No doubt, a wide discretion is given a trial Judge as to the evidence he will accept. It is not, however, an absolute discretion, and he should indicate his reason for rejecting evidence that he does not accept.

14 A.E. Popple, LL.B., in his annotation "Conflict Between Two Sets of Witnesses" (1946), 2 C.R. 47, said at p. 52:

> Where there is conflicting evidence and the trial judge accepts the version of one witness for example in preference to that of three others and there is evidence to support the conviction a Court of Appeal will not usually substitute its own opinion as to the guilt of the accused for that of the trial judge who has the advantage of seeing and hearing the witnesses: *Rex* v. *Bercovitch and Somberg* (1946), 1 C.R. 200.

[64] While the case referred to by the appellant does not provide a strong basis for finding that a duty to give more detailed reasons existed in this case, as the Crown points out, the governing law on sufficiency of a trial judge's reasons is the Supreme Court of Canada's decision in *R.* v. *Shepherd*, [2002] 1 S.C.R. 869. In that case Binnie J., for the court, set out several relevant principles, at pp. 896-898:

> My reading of the cases suggests that the present state of the law on the duty of a trial judge to give reasons, viewed in the context of appellate intervention in a criminal case, can be summarized in the following propositions, which are intended to be helpful rather than exhaustive:
>
> 1. The delivery of reasoned decisions is inherent in the judge's role. It is part of his or her accountability for the discharge of the responsibilities of the office. In its most general sense, the obligation to provide reasons for a decision is owed to the public at large.
>
> 2. An accused person should not be left in doubt about why a conviction has been entered. Reasons for judgment may be important to clarify the basis for the conviction but, on the other

hand, the basis may be clear from the record. The question is whether, in all the circumstances, the functional need to know has been met.

3. The lawyers for the parties may require reasons to assist them in considering and advising with respect to a potential appeal. On the other hand, they may know all that is required to be known for that purpose on the basis of the rest of the record.

4. The statutory right of appeal, being directed to a conviction (or, in the case of the Crown, to a judgment or verdict of acquittal) rather than to the reasons for that result, not every failure or deficiency in the reasons provides a ground of appeal.

5. Reasons perform an important function in the appellate process. Where the functional needs are not satisfied, the appellate court may conclude that it is a case of unreasonable verdict, an error of law, or a miscarriage of justice within the scope of s. 686(1)(a) of the *Criminal Code*, depending on the circumstances of the case and the nature and importance of the trial decision being rendered.

6. Reasons acquire particular importance when a trial judge is called upon to address troublesome principles of unsettled law, or to resolve confused and contradictory evidence on a key issue, unless the basis of the trial judge's conclusion is apparent from the record, even without being articulated.

7. Regard will be had to the time constraints and general press of business in the criminal courts. The trial judge is not held to some abstract standard of perfection. It is neither expected nor required that the trial judge's reasons provide the equivalent of a jury instruction.

8. The trial judge's duty is satisfied by reasons which are sufficient to serve the purpose for which the duty is imposed, i.e., a decision which, having regard to the particular circumstances of the case, is

> reasonably intelligible to the parties and provides the basis for meaningful appellate review of the correctness of the trial judge's decision.
>
> 9. While it is presumed that judges know the law with which they work day in and day out and deal competently with the issues of fact, the presumption is of limited relevance. Even learned judges can err in particular cases, and it is the correctness of the decision in a particular case that the parties are entitled to have reviewed by the appellate court.
>
> 10. Where the trial decision is deficient in explaining the result to the parties, but the appeal court considers itself able to do so, the appeal court's explanation in its own reasons is sufficient. There is no need in such a case for a new trial. The error of law, if it is so found, would be cured under the s. 686(1)(b)(iii) proviso.

[65] The Crown says the trial judge’s decision makes it clear why he concluded that the detention of the appellant was appropriate and that the arrest was made on proper grounds. The reasons, the Crown says, are sufficient to permit meaningful appellate review.

[66] As I have noted above, I am satisfied that, while the trial judge might have made clearer statements of certain evidentiary findings, at the very least the decision is sufficient to follow his reasoning with respect to the *Liquor Control Act* arrest.

***The burden of proof***

[67] On a related point, the appellant points out that the trial judge did not refer to the principles of the burden of proof, the presumption of innocence or proof beyond a reasonable doubt. The appellant notes the lack of reasons for the trial judge's conclusions on the evidence and refers to the following passage:

> Once the police have reasonable grounds to make the arrest or to detain, the citizen has no right to physically resist. Mr. Baptist knew that he had been accused of assault and that when Constable Tortola approached him it was because of that. Constable Tortola was engaged in the proper exercise of his duty. Mr. Baptist was not obligated to respond to any questioning. In the alternative he could have asserted his innocence had he chosen to do that. Physical resistance to the officer at this point was not only entirely disproportionate in the circumstances but also amounted to the commission of the offences with which Mr. Baptist has been charged.

[68] On the basis of these statements, the appellant says the trial judge, "in requiring an immediate response" by the appellant, disregarded the presumption of innocence. The Crown says the trial judge is presumed to know the law (as was noted in *Shepherd*, *supra*), particularly as it applies with respect to fundamental principles such as proof beyond a reasonable doubt. Further, the Crown says, the passage cited cannot reasonably be interpreted to mean that the trial judge confused the burden of proof.

[69] I am not convinced that the passage referred to by the appellant indicates that the trial judge was misapplying or misapprehending the burden of proof. The trial judge correctly observed that the appellant was not obligated to answer questions. I do not read the trial judge's words as suggested that there was an obligation on the appellant to assert his innocence.

***Conclusion***

[70] I am satisfied that the trial judge did not commit any reversible error in finding that the appellant was validly arrested under the *Liquor Control Act*. That being the case, the lack of certain clear findings respecting the detention does not affect the result. The appeal is dismissed.

**J.**