SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Pratt*, 2022 NSSC 390

Date: 20221116
Docket: CRH No. 511649
Registry: Halifax

Between:

His Majesty the King

v.

Maurice Pratt

DECISION ON VOIR DIRE 1 AND APPLICATION FOR STAY

Judge:	The Honourable Justice Scott C. Norton
Heard:	September 26,27 and October 27, 2022, in Halifax, Nova Scotia
Decision:	November 16, 2022
Counsel:	Roberty Fetterly, K.C., for the Crown G. Knia Singh, for Maurice Pratt

By the Court:

[1] Maurice Pratt is charged with assault peace officer and related offences from an altercation with court security officers in Dartmouth Provincial Court on October 23, 2018. The charges are scheduled for trial before me with a jury in February 2023.

[2] There were two pre-trial applications before me for decision:

1. The Crown sought a ruling on the admissibility of statements made by Mr. Pratt to security officers and to the Judge. At the outset of the hearing before me, Mr. Pratt conceded the admissibility of those statements:

    a. A Court audio recording of the appearance of Mr. Pratt for election before Judge Whalen in Dartmouth Provincial Court at 0928 on March 23, 2022.

    b. An unrecorded conversation between security officers and Mr. Pratt that precipitated the alleged physical incident that is the subject of the charges.

    c. A partial Court audio recording of the incident after the physicality has begun toward the end of the incident.

2. Mr. Pratt seeks a stay of the proceedings or, alternatively, a reduction in sentence should he be convicted of any charge. Mr. Pratt says that the security officers used excessive force during the physical altercation constituting a breach of his rights pursuant to s. 7 of the *Canadian Charter of Rights and Freedoms (Charter)*.

[3] I heard evidence from Mr. Pratt and eleven Crown witnesses.

[4] Mr. Pratt has the burden of proving on a balance of probabilities that: (1) the conduct of the security officers on October 23, 2018 amounted to an excessive use of force, and if that is proved; (2) that such excessive force constituted a breach of his s. 7 *Charter* rights; and, (3) the appropriate remedy is a stay of the proceeding or alternatively a reduction in sentence if he is convicted.

[5] For the reasons that follow, I find that Mr. Pratt has failed to prove that the conduct of the security officers amounted to excessive use of force. I find that there

has been no breach of Mr. Pratt's rights under s. 7 of the *Charter.* The Application is dismissed.

THE LEGAL FRAMEWORK

[6] In *R. v. Chaisson*, 2021 NSSC 197, I reviewed the legal principles that govern an application for a stay of proceedings based on an alleged violation of an accused's rights under s. 7 of the *Charter* at paras. 8-13:

> [8] With the advent of the *Charter*, the common law doctrine of abuse of process was merged with the rights of an accused under section 7 of the *Charter*.
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> [9] In *R. v. O'Connor*, 1995 4 S.C.R. 411, the Supreme Court of Canada held that there are two categories under which a stay for an abuse of process can be made. The "*Charter* category" relates to the fairness of an individual's trial resulting from state misconduct and asks whether the accused's fair trial interests have been irremediably harmed. The second category is unrelated to the fairness of the trial but involves state conduct that contravenes fundamental notions of justice and undermines the integrity of the judicial process. This second category, which represents the common law remedy, survives as a "residual" discretion, albeit a small one, to stay a prosecution aimed at protecting judicial integrity.
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> [10] L'Heureux-Dubé J., writing for the majority in *O'Connor*, stated at para 73:
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> > 73 As I have already noted, the common law doctrine of abuse of process has found application in a variety of different circumstances involving state conduct touching upon the integrity of the judicial system and the fairness of the individual accused's trial. For this reason, I do not think that it is helpful to speak of there being any one particular "right against abuse of process" within the *Charter*. Depending on the circumstances, different *Charter* guarantees may be engaged. For instance, where the accused claims that the Crown's conduct has prejudiced his ability to have a trial within a reasonable time, abuses may be best addressed by reference to s. 11(b) of the *Charter*, to which the jurisprudence of this Court has now established fairly clear guidelines (*Morin*, supra). Alternatively, the circumstances may indicate an infringement of the accused's right to a fair trial, embodied in ss. 7 and 11(d) of the *Charter*. In both of these situations, concern for the individual rights of the accused may be accompanied by concerns about the integrity of the judicial system. In addition, there is a residual category of conduct caught by s. 7 of the *Charter*. This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the *Charter*, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it

> contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

[Emphasis added in original]

[11] In *R. v. Piccirrilli*, 2014 SCC 16, the Supreme Court of Canada examined the issue of a stay of proceedings in cases where there had been an abuse of process. The trial judge had stayed proceedings for abuse of process because of attempts by the Crown to intimidate the accused into forgoing their right to trial by threatening additional charges should the accused choose to plead not guilty; collusion on the part of two police officers to mislead the Court about a seizure of a firearm; and improper means used by the Crown in obtaining the medical records of one of the accused. The Supreme Court of Canada, by a 6-1 split decision, held that the trial judge had erred in granting a stay and affirmed the rule that a stay of proceedings for an abuse of process should only be warranted in the clearest of cases. The Court stated that two types of state conduct may warrant a stay. The first is conduct that compromises the fairness of an accused's trial (the "main category"). The second is conduct that does not threaten trial fairness but risks undermining the integrity of the judicial process (the "residual" category).

[12] The majority held that the test for determining whether a stay of proceedings is warranted is the same for both categories and consists of three requirements (para 32):

> 1. There must be prejudice to the accused's right to a fair trial or to the integrity of the justice system that will be manifested, perpetuated and aggravated through the conduct of the trial, or by its outcome;
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> 2. There must be no alternate remedy capable of redressing the prejudice; and
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> 3. Where there is still uncertainty over whether a stay is warranted after steps 1 and 2, the Court must balance the interests in favour of granting a stay against the interest that society has in having a final decision on the merits.

[13] Mr. Chaisson invoked the residual category in this Application. The Court in *Piccirrilli* explained part 1 of the test in that circumstance as follows, at para 35:

> 35 By contrast, when the residual category is invoked, the question is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system. To put it in simpler terms, there are limits on the type of conduct society will tolerate in the prosecution of offences. At times, state conduct will be so troublesome that having a trial — even a fair one — will leave the impression that the justice system condones conduct that offends society's sense of fair play and decency. This harms the integrity of the justice system. In these kinds of cases, the first stage of the test is met.

> …
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> 39 At the second stage of the test, the question is whether any other remedy short of a stay is capable of redressing the prejudice. Different remedies may apply depending on whether the prejudice relates to the accused's right to a fair trial (the main category) or whether it relates to the integrity of the justice system (the residual category) … Where the residual category is invoked, however, and the prejudice complained of is prejudice to the integrity of the justice system, remedies must be directed towards that harm. It must be remembered that for those cases which fall solely within the residual category, the goal is not to provide redress to an accused for a wrong that has been done to him or her in the past. Instead, the focus is on whether an alternate remedy short of a stay of proceedings will adequately dissociate the justice system from the impugned state conduct going forward.
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> 40 Finally, the balancing of interests that occurs at the third stage of the test takes on added significance when the residual category is invoked. This Court has stated that the balancing need only be undertaken where there is still uncertainty as to whether a stay is appropriate after the first two parts of the test have been completed (*Tobiass,* at para. 92) …
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> 41 However, when the residual category is invoked, the balancing stage takes on added importance. Where prejudice to the integrity of the justice system is alleged, the court is asked to decide which of two options better protects the integrity of the system: staying the proceedings, or having a trial despite the impugned conduct. This inquiry necessarily demands balancing. The court must consider such things as the nature and seriousness of the impugned conduct, whether the conduct is isolated or reflects a systemic and ongoing problem, the circumstances of the accused, the charges he or she faces, and the interests of society in having the charges disposed of on the merits. Clearly, the more egregious the state conduct, the greater the need for the court to dissociate itself from it. When the conduct in question shocks the community's conscience and/or offends its sense of fair play and decency, it becomes less likely that society's interest in a full trial on the merits will prevail in the balancing process. But in residual category cases, balance must always be considered.

[Emphasis added]

[7] Mr. Pratt has invoked the residual category in this application.

FACTS

[8] I will note here that there were a number of small differences among the testimony of the Crown witnesses. In my view they were of a minor nature and what one would reasonably expect from various witnesses to any event, given the nature

of the event, the brief time during which the events transpired, and the different vantage points of the witnesses. I found the Crown witnesses credible and reliable, and I reject the suggestion made by Mr. Pratt that some of their evidence was made up to support their colleagues.

[9] Based on the testimony and exhibits in evidence before me, on a balance of probabilities I find the following facts.

[10] Mr. Pratt was charged with (and later pleaded guilty to) assaulting a correctional officer at the Central Nova Scotia Correctional Facility ("CNSCF"). On October 23, 2018, Mr. Pratt was scheduled to appear before the Honourable Judge Whalen in the Dartmouth Provincial Court, Courtroom #2, for election and plea on that charge. He was representing himself at that stage and attended by video link from the CNSCF.

[11] During his appearance, Mr. Pratt advised the judge that he had not been able to view a DVD video of the altercation with the correctional officer that was part of the disclosure made to him because the DVD did not work on the computer equipment made available to him at CNSCF. Judge Whalen ordered that Mr. Pratt be brought to the Dartmouth Provincial Court later that morning and he would be provided an opportunity to view the DVD in the courtroom with no judge or Crown Prosecutor ("Crown") present, and she would then hear from him as to election and plea.

[12] He was brought to Courtroom #2 escorted by Deputy Sheriff ("DS") Mike Barkhouse and DS Samantha Martin. DS Lee Nicholson was the courtroom officer that day. The court clerk was Becky McInroy. Before Mr. Pratt was brought into the courtroom his handcuffs were removed and he was seated at the counsel table in the front left side of the courtroom in front of the witness box. A television was located against the wall to the left of the table. A laptop computer was placed on the counsel table and the video disclosure was cued up to play on the laptop. Ms. McInroy provided some instruction on how to use the computer to view and rewind the video.

[13] Mr. Pratt requested and was provided with paper and a pen. The exact type of pen he was provided is disputed. The preponderance of the evidence establishes that it was a flex pen which is provided to persons in custody. It does not have a rigid body so that it is less effective as a weapon.

[14] Mr. Pratt watched the video and made some notes as he did so. He viewed the video completely through at least one time and rewound and replayed the section of the video containing the actual alleged assault on the correctional officer between six and eight times after which the video continued to play until the end.

[15] After it appeared that the video was at the end, DS Nicholson advised he was going to get the Crown and the Judge to return to the courtroom and that Mr. Pratt should move to the prisoner bench. Mr. Pratt expressed that he had not finished his review. DS Nicholson advised him that if he wanted more time, he could request that from the judge.

[16] DS Nicholson left the courtroom to get the Crown. DS Barkhouse then directed Mr. Pratt to sit on the prisoner bench. Standard court protocol is that persons in custody are seated on the prisoner bench with a security officer on each side of them when court is in session.

[17] Mr. Pratt continued to voice that he was not finished with his disclosure, and he would tell the security officers when he was done. He told DS Barkhouse to "fuck off" on at least two occasions in response to the direction to move to the prisoner bench. DS Barkhouse cautioned Mr. Pratt not to use that language in the courtroom.

[18] DS Barkhouse then closed the laptop computer. Mr. Pratt alleges that DS Barkhouse slammed it closed on his fingers. DS Barkhouse denies this and says that he closed it in the usual way one closes a laptop and Mr. Pratt's fingers were not on the laptop at that time. DS Martin saw the laptop being closed and says that it was not in contact with Mr. Pratt's fingers as he was making notes on the paper on his lap at the time. Notably, there is no evidence that at that time Mr. Pratt voiced any accusation that DS Barkhouse closed the laptop on his fingers. I find that the laptop was not closed on Mr. Pratt's fingers.

[19] After DS Barkhouse closed the laptop Mr. Pratt told him to "back the fuck up" and stood up. DS Barkhouse again directed him to sit on the prisoner bench and he took a swing at DS Barkhouse with his right arm.

[20] At this point both DS Martin and DS Nicholson attempted to physically restrain and control Mr. Pratt. DS Barkhouse also became physically engaged with Mr. Pratt. The three security officers and Mr. Pratt continued to struggle physically. Mr. Pratt was given repeated verbal directions to get down on the ground. The court

clerk pressed a panic alarm button that summoned several additional security officers to the courtroom.

[21] The altercation between Mr. Pratt and the security officers was in the area of the witness box. At one point the group of security officers and Mr. Pratt fell hard to the floor area between the witness box and counsel tables. Mr. Pratt continued to struggle on the ground as the security officers attempted to restrain and gain control of his arms so that he could be handcuffed. At one point, concern was expressed that Mr. Pratt had blood around his mouth and this could be transferred by his heavy breathing and yelling, and his shirt was pulled over his face to prevent that.

[22] Eventually Mr. Pratt was handcuffed and stood up. His legs were not shackled. Mr. Pratt was removed from the courtroom. He refused to walk down the steps to the cells and so he was carried. He was placed on the floor in the cell and left handcuffed.

[23] Mr. Pratt requested a nurse to assess an injury to his finger. He was taken by EHS ambulance to Dartmouth General Hospital. Mr. Pratt testified that his ring finger on his right hand was diagnosed as being dislocated. It was relocated by the doctor and splinted. No medical evidence was tendered about this injury.

[24] DS Martin testified that she sustained a fractured knuckle to her index finger. DS Nicholson testified that he sustained facial bruising caused by Mr. Pratt's hands and punctures to the skin around his eyes and an injury to the right eyeball caused by the flex pen. No medical evidence was tendered about these injuries.

[25] Mr. Pratt could not identify the specific cause of his dislocated finger. He recalls that it was injured while he was struggling with the security officers and while they were still standing. There is no evidence that it was an intentional injury to his finger.

[26] I find the evidence does not establish that Mr. Pratt was struck in the face by the sheriff officers involved in the altercation. No medical evidence was tendered about any facial injury. No photographic evidence was tendered of any facial injury. I find that the facial injuries sustained by Mr. Pratt were minor and likely caused during his struggle with the officers and/or his fall to the floor.

[27] The evidence of all security officers was that there were no punches or blows struck by them against Mr. Pratt. One officer said that he swatted at Mr. Pratt's right hand or wrist when he saw that it contained a flex pen. The officer testified that this

could technically be considered a strike, but it did not make contact with Mr. Pratt's face.

[28] The evidence from various security officers described the use of force continuum that they had received training on. It is best described as a relationship of the degree of force used in response to the level of resistance of the person being encountered. Communication, tactical consideration, and perception continue throughout the continuum:

Level of Resistance	Use of Force
cooperative	officer presence, communication
passive resistance	soft, empty hand control
active resistance	hard, empty hand control
assaultive	intermediate weapons*
grievous bodily harm/death	lethal force

*pepper spray, baton, conducted energy weapon

[29] In the present case, the level of force used was described as soft, empty hand control. I find that the evidence did not establish that there were any punches, strikes, blows or kicks administered.

Law

[30] The Crown relies on the *Court Security Act*, SNS, 1990, c. 7 and s. 25(1) of the *Criminal Code* as providing the security officers with the legislative power to give direction to Mr. Pratt and to use as much force as is necessary to remove a person who is causing a disturbance in the court area.

[31] Both the Crown and Mr. Pratt referred the Court to *R. v. Nasogluak*, 2010 SCC 6, as establishing the relevant test for excessive force amounting to an abuse of process under s. 7 of the *Charter*. The Defence also referred to *R. v. Tran*, 2010 ONCA 471, and *Fleming v. Ontario*, 2019 SCC 45. The Crown referred to *R. v. DaCosta*, 2015 ONSC 1586; *R. v. Hussey-Rodrigues*, 2022 ONSC 1569; and *R. v. McCready*, 2020 NSPC 41.

[32] I refer to and adopt the extensive summary of the governing principles made by Justice Hill in *DaCosta*, from paragraphs 92 - 105. Justice Hill notes at para. 98

that a court reviewing officer conduct must guard against the tendency to over-reliance upon reflective hindsight:

> **98** Apart from the interpretive caution to consider all the circumstances faced by the police, a reviewing court must guard against the tendency to over-reliance upon reflective hindsight:
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> > It is often said of security measures that, if something happens, the measures were inadequate but that if nothing happens, they were excessive. These sorts of after-the-fact assessments are unfair and inappropriate when applied to situations like this where the officers must exercise discretion and judgment in difficult and fluid circumstances. The role of the reviewing court in assessing the manner in which a search has been conducted is to appropriately balance the rights of suspects with the requirements of safe and effective law enforcement, not to become a Monday morning quarterback.
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> > (*R. v. Cornell*, [2010] 2 S.C.R. 142, at para. 24)
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> . . . . .
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> > The point is: officers have a duty to protect and a right to their own safety. Assessing whether belligerent and intoxicated persons might harm other members of the household or might take out their anger against the officers is not governed by clearly defined rules. It is an exercise in discretion and judgment, often guided by experience. Second-guessing is not helpful. As Cromwell J. explained in Cornell, judges who review the decisions of officers should be slow to intervene on the basis of hindsight (at para. 24)...
> >
> > (*R. v. Alexson*, 2015 MBCA 5, at para. 20)
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> . . . . .
>
> > ...the immediate decisions a police officer makes in the course of duty are not assessed through the "lens of hindsight"...
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> > (*Crampton v. Walton* (2005), 194 C.C.C. (3d) 207 (Alta.C.A.), at para. 45)
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> . . . . .
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> > ...his conclusion was inappropriately based, at least in part, on hindsight...
> >
> > (*Webster v. Edmonton (City) Police Service*, 2007 ABCA 23, at para. 28)
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> **99** A critical contextual circumstance for many arrests is the dynamic and fluid nature of an apprehension with the need for rapid, on-the-spot decisions by a police constable:
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> > A certain amount of latitude is permitted to police officers who are under a duty to act and must often react in difficult and exigent circumstances.

(*Asante-Mensah*, at para. 73)

. . . . .

[measures] reasonably necessary to eliminate threats to the safety of the public or the police ...will generally be conducted by the police as a reactionary measure... they will generally be unplanned, as they will be carried out in response to dangerous situations created by individuals, to which the police must react "on the sudden".

(*MacDonald*, at para. 32 per LeBel J.)

. . . . .

...police officers put their lives and safety at risk in order to preserve and protect the lives and safety of others...[in] potentially dangerous situations...

(*MacDonald*, at para. 64 per Moldaver and Wagner JJ.)

. . . . .

The justifiability of the officers' conduct must always be measured against the unpredictability of the situation they encounter and the realization that volatile circumstances require them to make quick decisions...

(*Alexson*, at para. 20)

. . . . .

The police are often placed in situations in which they must make difficult decisions quickly, and are to be afforded some latitude for the choices they make. See *R. v. Asante-Mensah*, [2003] 2 S.C.R. 3 at para. 73. Courts recognize that law enforcement is dangerous; no one wants police officers to compromise their safety.

…

Police officers act in dangerous and unpredictable circumstances.

(*Crampton*, at paras. 22, 44)

. . . . .

In this case, I am concerned with the police interest in protecting the safety of those at the scene of the arrest. This interest is often the most compelling concern at an arrest scene and is one which must be addressed immediately. In deciding whether the police were justified in taking steps to ensure their safety, the realities of the arrest situation must be acknowledged. Often, and this case is a good example, the atmosphere at the scene of an arrest is a volatile one and the police must expect the unexpected. The price paid if inadequate measures are taken to secure the scene of an arrest can be very high indeed. Just as it is wrong to engage in ex post facto justifications of police conduct, it is equally wrong to ignore the realities of the situations in which police officers must make these decisions.

> In my opinion, one cannot ask the police to place themselves in potentially dangerous situations in order to effect an arrest without, at the same time, acknowledging their authority to take reasonable steps to protect themselves from the dangers to which they are exposed. If the police cannot act to protect themselves and others when making an arrest, they will not make arrests where any danger exists and law enforcement will be significantly compromised.
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> (*R. v. Golub* (1997), 117 C.C.C. (3d) 193 (Ont. C.A.), at paras. 44-5, notice of discontinuance filed [1997] S.C.C.A. No. 571)

Analysis

[33] Mr. Pratt has the burden of establishing on the balance of probabilities an abuse of process or breach of his s. 7 *Charter* rights.

[34] Generally, persons in custody are not restrained inside the courtroom in Canada. Instead, they are subject to the management and direction by court security officers who, subject to the direction of the judge, are responsible for the safety of all persons in the courtroom. The court security officers are by statute authorized to give direction to persons in custody in accordance with the protocols developed for when the court is in session. If the person in custody does not follow their verbal directions, they are authorized to use as much force as is reasonably necessary to require compliance and to remove anyone resisting compliance from the courtroom.

[35] In the present case, Mr. Pratt chose not to comply with the reasonable direction by the security officers to move to the prisoner bench consistent with court protocol for when court is in session. Mr. Pratt chose to escalate the interaction he had with the security officers after he was told that the Crown Prosecutor and Judge were coming back into the courtroom. He was advised of his ability to ask the Judge for additional time. He was experienced in the criminal justice system and knew, or ought to have known, that it was the Judge who granted him the opportunity to review disclosure on the courtroom laptop and it was the Judge who would determine if more time was reasonable. That was not a decision for Mr. Pratt to make. Instead of moving to the prisoner bench as directed to wait for the Judge and then make his case for more time to review disclosure, Mr. Pratt chose to become verbally and then physically assaultive with the security officers.

[36] A core duty of the security officers is to maintain the safety and security of the courtroom for counsel, staff, the judiciary, the public, and for persons in custody. That duty and the authority to direct persons in custody within the courtroom is

found in the *Court Security Act*, SNS 1990, c.7. Section 3(1) of the *Act* states that every security officer has the powers of a peace officer.

[37] I find that Mr. Pratt's conduct meets the definition of a person causing a disturbance in s. 3(3) of the *Act*. Pursuant to s. 3(2), the security officers may require a person causing a disturbance to leave the Court area and may use as much force as is necessary to force the person to leave.

[38] Pursuant to s. 25(1) of the *Criminal Code*, peace officers are authorized to use reasonable force to perform their duties.

[39] In the result, on a consideration of the totality of the circumstances, Mr. Pratt has failed to establish that the force was excessive. To the contrary, I find the force was necessary, reasonable, and proportionate in all the circumstances.

[40] The application is dismissed.

Norton, J.