

SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Boliver, 2013 NSSC 359

Date: 20131118

Docket: CRBW.410263

Registry: Bridgewater

Between:

Richard Temple Boliver

Appellant

v.

Her Majesty the Queen

Respondent

Judge: The Honourable Justice C. Richard Coughlan

Heard: June 11, 2013 Nova Scotia

Written Decision: November 18, 2013.

Counsel: Wayne Bacchus, counsel for the Appellant
C. Lloyd Tancock, counsel for the Respondent

By the Court:

[1] On November 7, 2012 Richard Temple Boliver was convicted of public intoxication contrary to s. 87(1) of the *Liquor Control Act*, R.S.N.S. 1989 c. 260; mischief contrary to s. 430(4) of the *Criminal Code of Canada*; and resisting police officers engaged in the execution of their duty contrary to s. 129 of the *Criminal Code*. Mr. Boliver has appealed his convictions. The grounds of appeal are set out in an Amended Notice of Summary Conviction Appeal as follows:

1. That the trial judge erred in law by neither ordering a stay of proceedings nor ordering a mistrial when the Crown failed to respond to the appellant's request for the "can-say" of a material witness until after the appellant had closed its evidence on the *Charter* application.
2. That the trial judge erred by failing to maintain trial fairness.
3. That the trial judge erred in law in finding that the arrest of the appellant was lawful and not in violation of the *Charter*.
4. That the trial judge erred in law in finding that the police did not use excessive force and did not violate the appellant's *Charter* rights.
5. That the trial judge erred in law by not finding that the appellant was subjected to cruel and unusual treatment by the police in violation of his *Charter* rights.
6. That the trial judge erred in law by failing to grant an appropriate and just remedy for the *Charter* violations of ss. 10(a) and 10(b) that were found.
7. That the trial judge's assessment of the credibility of the witnesses was unreasonable.
8. The verdict in relation to the *Charter* Application wherein the appellant's allegations were dismissed, and all facts derived therefrom and related to the verdict in the trial proper should be set aside as unreasonable or cannot be supported by the evidence.
9. The appeal be allowed and the charges stayed as to do otherwise would result in a miscarriage of justice given the totality of the proceedings.

10. Such other grounds as may appear on the record.

[2] The facts as found by the trial judge are: Richard Boliver, his twin brother Royce Boliver and their nephew, Ryan Whynot decided to go to Tomorrow's Lounge in the Bridgewater Mall, Bridgewater, Nova Scotia. All had consumed alcohol before going to the lounge. They had drinks inside the lounge. They went outside to smoke cigarettes. Richard Boliver and Ryan Whynot were readmitted to the lounge but Royce Boliver was not, as lounge staff considered him intoxicated.

[3] Royce Boliver went outside. Constable Jennifer Russell of the Bridgewater Police approached the mall in her patrol car. Accompanying her was a civilian, Arden Weagle. Constable Russell spoke to Royce Boliver. Constables Matthew Bennett and Morgan Gibson arrived in their patrol car.

[4] Royce Boliver was given the option of either going home or going to jail. Mr. Boliver's sister, Renee Boliver, was asked by Royce to get Richard Boliver and Ryan Whynot. She did so.

[5] Richard Boliver and Ryan Whynot came out. Richard Boliver, who had consumed a minimum of six alcoholic drinks, quickly became the focus of police attention when he began confronting the police in general and Constable Russell in particular. Richard Boliver was loud, aggressive and quickly became out of control in this confrontation with Constable Russell. He attracted a significant amount of attention. Royce Boliver was asking the crowd, which had gathered, to involve themselves in the incident. Richard Boliver was causing a disturbance and acting in a manner consistent with an inebriated state. Richard Boliver was advised he was under arrest.

[6] A violent struggle ensued, in which Constables Gibson and Bennett attempted to gain control of Richard Boliver by handcuffing him. The officers were successful in getting one of Mr. Boliver's wrists attached to handcuffs. Constables Bennett and Gibson and Richard Boliver fell to the ground. Mr. Boliver, a very large man, thrashed about with one wrist handcuffed and the handcuffs flailing from his one cuffed wrist.

[7] Mr. Weagle was asked by Constable Russell to assist the police by attempting to control Richard Boliver's legs. The crowd was becoming more vocal.

[8] Constables Gibson and Bennett tried a number of holds, hand strikes, and pressure point applications, to no avail. Constable Russell issued a warning to Richard Boliver if he did not stop resisting and put his hands behind his back he would be tasered. Mr. Boliver did not comply and he was tasered. The first deployment of the taser did not render Mr. Boliver compliant. It was only after the second deployment of the taser Mr. Boliver's struggles subsided to the point he could be handcuffed and brought to the patrol car.

[9] In the patrol car Richard Boliver's actions remained out of control. They were violent. He was screaming, cursing and banging on the window. He kicked the rear door with so much force he damaged it, leaving it bowed outward.

[10] Richard Boliver was transported to the RCMP cells. Emergency Health Services (EHS) was contacted to remove the taser darts. Mr. Boliver was placed in a cell. When EHS arrived they started an assessment on Mr. Boliver and he refused to be assessed. EHS left. Then Mr. Boliver changed his mind. EHS returned and Richard Boliver was taken to the hospital. Mr. Boliver's emotional state was such that it was not possible for the police to explain the reason for his detention and/or the nature of the charges and/or his right to counsel until after his return to the police station from the hospital.

[11] The scope of review of a Summary Conviction Appeal Court was set out by Cromwell, J.A., as he then was, in giving the court's judgment in *R. V. Nickerson*, 1999 NSCA 168 as follows:

[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: see sections 822(1) and 686(1)(a)(i) and *R. v. Gillis* (1981), 60 C.C.C. (2d) 169 (N.S.S.C.A.D.) per Jones, J.A. at p. 176. 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*, [1994] 1 S.C.R. 656 at 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."

In addressing the various grounds of appeal I will use the same numbering as in the Amended Notice of Summary Conviction Appeal.

Ground 1

[12] Richard Boliver submits the trial judge erred by not ordering either a stay of proceedings or a mistrial when the Crown failed to respond to his request for the "can-say" of Arden Weagle until after he had closed his case on his *Charter* (*Canadian Charter of Rights and Freedoms*) application. There is no merit to this ground of appeal.

[13] Mr. Boliver's counsel was informed of Arden Weagle's existence by at least January 29, 2010 receiving an e-mail from Constable Russell which contained the following:

"Item#8 - Arden WEAGLE's notes - He was a plain clothes ride-a-long who does not write reports or take notes, his role was extra eyes, ears, and hands."

[14] There was plenty of time for Mr. Boliver's counsel to interview Mr. Weagle prior to the hearing of the *Charter* applications. The fact Mr. Weagle was being called as a witness by the crown was discussed in court on April 13, 2011 and Mr. Weagle's testimony was adjourned to August 31, 2011 to allow Mr. Boliver's counsel to prepare to deal with his evidence. In addition, the trial judge offered to allow Mr Boliver to apply to reopen his case on the *Charter* application if Mr. Boliver felt it necessary to do so upon the conclusion of Mr. Weagle's evidence.

[15] Any perceived prejudice to Mr. Boliver was cured by the combination of the above mentioned factors. The non-disclosure of a "can-say" statement from Arden Weagle would not have affected the outcome of the trial.

Ground 6

[16] There is no question Mr. Boliver's rights pursuant to ss.10(a) and 10(b) of the *Charter* were violated. Sections 10(a) and (b) of the *Charter* provide:

10. Everyone has the right on arrest or detention
 - (a) to be informed promptly of the reasons therefor;
 - (b) to retain and instruct counsel without delay and to be informed of that right;

[17] The trial judge found Mr. Boliver was told "you're under arrest" but nothing else until after his return from the hospital. The only evidence as to the information Mr. Boliver received from the police as to the reasons for his arrest and his right to counsel was that of Mr. Boliver himself. His evidence on that issue was as follows:

Q. What, when were you read your rights?

A. I wasn't. . . .

Q. When did you speak to a lawyer?

A. Ah, I, I can't recall the, the date.

Q. When, when that evening, on March 14th, when that evening did you speak to a lawyer?

A. I didn't.

Q. When were you told by the police that you were allowed to speak to a lawyer?

A. I wasn't.

Q. When were you given the Legal Aid phone number to contact free duty counsel?

A. I wasn't.

Q. When were you advised of free duty counsel?

A. I wasn't.

Q. When did they tell you the charges you were arrested for?

A. Ah, it was in the morning.

[18] Mr. Boliver was not informed of the reasons for his arrest until the next morning. He was never informed of his right to retain and instruct counsel.

[19] The trial judge although finding Mr. Boliver's rights pursuant to ss. 10(a) and (b) of the *Charter* had been infringed refused to grant a remedy.

[20] The trial judge found the police did not act in a malicious or high handed manner. That there was a prolonged period of time during which it would be pointless to have attempted to explain the reasons for arrest to Mr. Boliver because of his condition. There was no evidence the judge was asked to exclude. There was no evidence obtained from the breach of Mr. Boliver's *Charter* rights. Virtually all of the actions which constituted elements of offences for which he was charged were committed long before the police would have had a reasonable opportunity to explain the charges to him and his right to counsel. The trial judge concluded:

. . . "Mr. Boliver has requested a stay. I cannot conclude that this is "one of those clearest of cases" where continuing the prosecution would represent an inevitable affront to society's sense of fair play and decency. Even if I had, I would have concluded that the affront does not outweigh society's justifiable and understandable interest in seeing cases such as this prosecuted effectively. Accordingly, although I find that there has been a violation of the accused's s. 10(a) and (b) rights, under the circumstances I am not persuaded that this is an appropriate case in which to grant the remedy sought, or any remedy, to the accused. . . ."

[21] Section 24 of the *Charter* provides:

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[22] There is no question, based on the evidence Mr. Boliver's rights pursuant to ss. 10(a) and (b) of the *Charter* were violated. However, the breaches had no

effect on the charges against Mr. Boliver. No evidence was obtained as a result of the violation of his rights.

[23] Despite the absence of any evidence being obtained as a result of the *Charter* violations as McLachlin, C.J. and Charron, J. stated in giving the majority judgment in *R. v. Grant* 2009 SCC 32: “The fact of the *Charter* breach means damage has already been done to the administration of justice.” Here the trial judge found the violation had been inadvertent; stating at paragraph 133 of his decision:

... “It (sic) light of the significant efforts that it took to gain control of the accused, effect his arrest, get him in the patrol car, get him some medical attention, get him to the hospital, and then get him back to the station, it is possible to understand how this omission may have occurred, without condoning it.”....

[24] As set out above, no evidence was obtained as a result of the *Charter* violation. That fact is balanced by the fact there is evidence Mr. Boliver was never informed of his right to counsel pursuant to section 10(b) of the *Charter*. Considering the facts as found by the trial judge which include the inadvertent nature of the *Charter* violations, it has not been demonstrated there is any basis to interfere with the trial judge’s decision to refuse to grant a remedy to Mr. Boliver for the violations of his Section 10(a) and (b) *Charter* rights. This ground of appeal fails.

Ground 2

[25] There is no merit to this ground of appeal. In reviewing the extensive transcript it is clear the trial judge ensured Mr. Boliver was afforded trial fairness.

Ground 3

[26] For the reasons set out by the trial judge the arrest of Mr. Boliver was lawful and not in violation of the *Canadian Charter of Rights and Freedoms*.

Ground 4

[27] From the reasons set out by the trial judge the police did not use excessive force in arresting Mr. Boliver.

Ground 5

[28] For the reasons set out by the trial judge Mr. Boliver was not subjected to cruel and unusual punishment in violation of his rights pursuant to Section 12 of the *Charter*.

Grounds 7, 8 and 9

[29] These grounds are without merit. The trial judge heard the evidence and made findings of fact and assessed credibility as he was entitled to do. There was evidence to support the findings of fact and assessment of credibility the trial judge made. There was no miscarriage of justice.

[30] The appeal is dismissed.

Justice C. Richard Coughlan