SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. MacInnis*, 2014 NSSC 262

Date: 2014-07-09
Docket: PtH No. 426996
Registry: Port Hawkesbury

Between:

Deborah Ann MacInnis

Applicant

v.

Her Majesty the Queen

Respondent

Decision on Summary Conviction Appeal

Judge:	The Honourable Justice Robin C. Gogan
Heard:	July 2, 2014, in Port Hawkesbury, Nova Scotia
Written Decision:	July 9, 2014
Counsel:	Kevin Patriquin, for the Applicant Cheryl Schurman, for the Respondents

By the Court:

Introduction

[1] On March 9, 2014, Deborah MacInnis spent some time drinking with a friend. She became intoxicated, emotional and upset. Her friend wanted her to leave. He called 911. The police attended and found Ms. MacInnis extremely intoxicated. Ms. MacInnis was arrested and taken to the police station. Her behaviour deteriorated and she spit at the officers.

[2] Judge Laurel Halfpenny MacQuarrie found Ms. MacInnis guilty of assaulting the police officers and 2 related breach offences. Ms. MacInnis appealed her convictions. She says that her arrest was unlawful and that she used reasonable force in resisting the unlawful arrest.

[3] This case involves an analysis of the common law power of arrest for anticipated breach of the peace.

[4] For the reasons that follow, I dismiss the appeal.

Decision under Appeal

[5] Ms. MacInnis was charged on an information that:

> On or about the 9th day of March, 2014, at or near Port Hawkesbury, Nova Scotia, did assault Constable Tammy Wade and Constable Deepak Prasad, peace officers engaged in the execution of their duty contrary to Section 270(2) of the ***Criminal Code***.
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> And furthermore at the same time and place did, being at large on her undertaking given to a judge and being bound to comply with a condition of that undertaking to wit keep the peace and be of good behavior without lawful excuse failed to comply with that condition by assaulting Constable Tammy Wade and Constable Deepak Prasad contrary to Section 145(3) of the ***Criminal Code***.
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> And furthermore at the same time and place did, while being bound by a probation order made by the Nova Scotia Provincial Court on January 28, 2013, failed without lawful excuse to comply with such order, to wit keep the peace and be of good behavior contrary to Section 733.1(1) of the ***Criminal Code***.

[6] Ms. MacInnis was tried on the charges on April 16 and 17, 2014. The trial judge heard evidence from Constables Prasad and Wade. Ms. MacInnis did not testify.

[7] The officers testified that they attended at the home of John MacDonald at 2 Nova Court in Port Hawkesbury on March 9, 2014 as a result of a 911 "hang up" call. Upon arrival, they observed two people in the residence. Constable Wade asked John MacDonald to step outside where she spoke to him. Constable Prasad went into the residence and spoke to Ms. MacInnis.

[8] John MacDonald advised Constable Wade that he and Ms. MacInnis had been drinking, that Ms. MacInnis' behavior had changed, she became upset and emotional, and he wanted her to leave. He had called 911. John MacDonald confirmed that he was requesting police assistance to remove Ms. MacInnis from his residence.

[9] Constable Prasad spoke to Ms. MacInnis. The evidence was that Ms. MacInnis was well known to both officers. Constable Prasad recognized her almost immediately. He determined that she was "highly intoxicated". Her words were slurred, she smelled of alcohol and she was laughing uncontrollably. She made inappropriate and sexually explicit comments to Constable Prasad. She needed assistance when she stood up.

[10] The most significant evidence to this appeal related to the officers previous knowledge of Ms. MacInnis. Both officers testified to her history of contact with police. She had been previously convicted of an assault of Constable Prasad. She was known to be volatile, unpredictable and violent when intoxicated. This gave the officers serious concerns about allowing Ms. MacInnis to go home on her own. The officers testified and were cross-examined as to their assessment of the possible resolutions.

[11] In the end, the officers gave evidence that they had "grave concerns" for Ms. MacInnis' personal safety. The officers were also concerned about public safety. Finally, the officers shared the view that there was a likelihood that Ms. MacInnis would commit further criminal offences if she was allowed to leave the residence on her own. The officers' beliefs were based upon the circumstances before them, their observation that Ms. MacInnis was "extremely intoxicated", and their past dealings with her.

[12] Given the officers' beliefs, Constable Prasad arrested Ms. MacInnis for an anticipated breach of the peace. At the point of arrest, it is uncontested that Ms. MacInnis was compliant with the request to leave the residence and was not actually in breach of the peace.

[13] Once arrested and in the police car, Ms. MacInnis' behavior deteriorated. This continued once inside the holding cell at the detachment. Ms. MacInnis struggled with the officers. While being physically restrained by both officers, she was able to spit at them twice. The officers brought Ms. MacInnis under control and left her safely in the holding cell shortly thereafter.

[14] The trial judge summarized the evidence in her Decision. Before setting out her findings of fact, the trial judge reviewed the authorities and found that the

police had a common law right to arrest for an anticipated breach of the peace. In doing so, she adopted the analysis set out in ***Brown v. Durham Regional Police Force***, 1998 CarswellOnt 5020.

[15] Having heard the evidence of the officers, the Trial judge found:

> [17] In Ms. MacInnis' case both police officers articulated fairly their concerns regarding Ms. MacInnis should she leave the MacDonald residence. These were not frivolous or unsubstantiated concerns. They were concerns based upon their first hand dealings with Ms. MacInnis in the past which included her mental health status, her volatility while intoxicated, other assaultive behaviour including that towards police and other general criminal behaviour. Furthermore, they queried her as to the availability of a responsible person to oversee her and no one was attainable. Ms. MacInnis according to both police officers was simply not drunk but was extremely intoxicated to the point they feared for her physical well-being and health.

[16] The trial judge then concluded:

> [18] In all those circumstances I find that Cst. Prasad together with Cst. Wade acted on a reasonable basis in the arrest of Ms. MacInnis for what they reasonably believed would be the consequence or consequences should she be permitted to leave the MacDonald residence.

[17] As to the subsequent incident of spitting during the booking process, the trial judge continued:

> [19] On the issue of whether spitting as described by both officers by Ms. MacInnis constitutes an assault this Court rules and relies on the reasoning in ***R. v. EBK*** 2002 YKYC at page 6 at paragraph 38 therein.

> [20] In all of the circumstances Ms. MacInnis had been arrested by law and her conduct by spitting according to that decision and which I clearly agree with in all of the circumstances was an assault.

[18] The trial judge found Ms. MacInnis guilty of all charges.

Issues

[19] The issues raised on this appeal are as follows:

> (a) Did the trial judge err in law in finding that there is a common law power to arrest for anticipated breach of the peace;
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> (b) If such a common law power exists, did the trial judge err in the application of the law in the circumstances of this case; and
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> (c) Did the trial judge err by finding that Ms. MacInnis assaulted Officers Wade and Prasad.

[20] Ms. MacInnis did not raise any issue as to the factual findings made by the trial judge. This was a prudent approach given that the trial judge's findings of fact are well supported by the evidence of Constables Wade and Prasad.

[21] Ms. MacInnis did not contest that the officers were engaged in the lawful execution of their duty as peace officers at the time of the arrest. The officers were

responding to a 911 call and their attendance at the residence and consequent investigation was required in the circumstances and entirely appropriate.

[22] Finally, Ms. MacInnis concedes that if her arrest was lawful, her act of spitting at the police officers constitutes an assault.

Position of the Parties

Deborah Ann MacInnis

[23] Ms. MacInnis seeks an acquittal of the charges for which she was convicted at trial. She says that the police officers had no power to arrest her. She was not breaching the peace and there is no legal basis to arrest for apprehended breach of the peace in the ***Criminal Code***.

[24] Ms. MacInnis further submits that if a common law authority to arrest exists, her arrest was still not lawful. The officers had no basis to believe that she was about to breach the peace. Ms. MacInnis argued forcefully that "something more was required" to justify her arrest. The trial judge erred in finding that a reasonable basis existed for an arrest in the circumstances.

[25] Finally, Ms. MacInnis argues that her subsequent act of spitting at the police officers was reasonable resistance to an unlawful arrest.

The Crown

[26] The Crown submits that the officers acted within the scope of their common law authority. The trial judge did not err when she found that the officers had the authority to arrest Ms. MacInnis and that the circumstances provided sufficient grounds for the officers to enact a lawful arrest. There is no basis to disturb the trial judge's findings of fact or law.

Analysis

Standard of Review

[27] This is a summary conviction appeal brought by Ms. MacInnis pursuant to Section 813 of the ***Criminal Code*** which provides:

> 813. Except where otherwise provided by law,
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> (a) the defendant in proceedings under this Part may appeal to the appeal court:
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> (i) from a conviction or order made against him,
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> …

[28] By virtue of Section 822(1) of the ***Criminal Code***, the provisions dealing with appeals for indictable offences generally have application to summary conviction appeals. Section 822(1) states:

> 822(1) Where an appeal is taken under section 813 in respect of any conviction, acquittal, sentence, verdict or order, sections 683 to 689, with the exception of subsections 683(3) and 686(5), apply, with such modifications as the circumstances require.

[29] The powers of an appellate court are set out in Section 686(1) of the ***Criminal Code***:

> 686(1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
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> (a) may allow the appeal where it is of the opinion that
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> i. the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
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> ii. the judgement of the trial court should be set aside on the ground of a wrong decision on a question of law, or
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> iii. on any ground there is a miscarriage of justice.

[30] The standard of review for summary conviction appeals was reviewed by in ***R. v. C.E.***, 2009 NSCA 79. At paragraph 30, Fichaud J.A. adopted the following analysis of the standard of review:

> [30] In ***R. v. Nickerson***, 1999 NSCA 168, Justice Cromwell described the standard to be applied by a Summary Conviction Appeal Court to a decision of a trial court:
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> [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.
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> To the same effect: *RHL*, at p 21 and *Farrell* at p 9.

[31] At paragraph 37 of his decision, Justice Fichaud made the following observation which is relevant to the disposition of the present appeal:

> [37] In *Brown*, Justice Doherty (p.74) said that "[t]o invoke either power [to arrest under s. 495(1)(a) or at common law for anticipated breach of the peace], the police officers must have reasonable grounds for believing" that the arrest would avert an anticipated breach of the peace. As with an arrest under s. 495(1)(a) of the *Code*, the objective test is applied to the officer's *subjective ground for arrest*. *R. v. Feeney*, [1997] 2. S.C.R. 13 at p 24. *R. v. Storrey*, [1990] 1 S.C.R. 241 at pp 250-251. The officer's subjective ground for arrest is a fact, not a point of law.

[32] The present appeal raises an error of law and in the alternative, a misapplication of the law to the facts.

[33] It is well settled that the standard of review for questions of law under Section 686(1)(a)(ii) is correctness. In ***Housen v. Nikolaisen***, 2002 SCC 33,

Justices Iacobucci and Major revisited and perhaps clarified the standards of review. As to the standard of review for questions of law, they confirmed:

> 8 On a pure question of law, the basic rule with respect to the review of a trial judge's findings is that an appellate court is free to replace the opinion of the trial judge with its own. Thus, the standard of review on a question of law is that of correctness: *Kerans, supra,* at p. 90.
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> 9 …Thus, while the primary role of the trial courts is to resolve individual disputes based on the facts before them and settled law, the primary role of the appellate courts is to delineate and refine legal rules and ensure their universal application. In order to fulfill the above functions, appellate courts require a broad scope of review with respect to matters of law.

[34] For questions of mixed fact and law, the standard of review is more difficult to articulate and apply. In ***Housen***, *supra*, the standard of review for these questions was described, in part, as follows:

> 27 Once it has been determined that a matter being reviewed involves the application of a legal standard to a set of facts, and is thus a question of mixed fact and law, then the appropriate standard of review must be determined and applied. Given the different standards of review applicable to questions of law and questions of fact, it is often difficult to determine what the applicable standard of review is. In *Southam, supra,* at para. 39, this Court illustrated how an error on a question of mixed fact and law can amount to a pure error of law subject to the correctness standard:
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> > …if a decision maker says that the correct test requires him or her to consider A, B, C and D, but in fact, the decision maker considers only A, B and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

> Therefore, what appears to be a question of mixed fact and law, upon further reflection, can actually be an error of pure law.
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> 28 However, where the error does not amount to an error of law, a higher standard is mandated. Where the trier of fact has considered all of the evidence that the law requires him or her to consider and still comes to the wrong conclusion, then this amounts to an error of mixed fact and law and is subject to a more stringent standard of review: *Southam*, *supra*, at paras. 41 and 45. While easy to state, this distinction can be difficult in practice because matters of mixed fact and law fall along a spectrum of particularity. This difficulty was pointed out in *Southam*, *supra*, at para. 37:
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> > …the matrices of facts at issue in some cases are so particular, indeed so unique, that decisions about whether they satisfy legal tests do not have any great precedential value. If a court were to decide that driving at a certain rate of speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed fact and law. See R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), at pp. 103-108. Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over the general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future.

[35] As will be seen in the following analysis, I am of the view that the question as to whether a common law power to arrest for anticipated breach of the peace exists is a pure question of law which must be decided correctly.

[36] Conversely, I am of the view that the trial judge's application of the legal standard in this case is one of mixed fact and law, but primarily fact, and therefore

one that is entitled to much deference on appeal. Accordingly, I apply a more stringent standard of review to the latter question.

Issue 1 - Did the trial judge err in law in finding that there is a common law power to arrest for anticipated breach of the peace;

[37] Ms. MacInnis submits that the only authority which exists to arrest for breach of the peace is found in Section 31(1) of the ***Criminal Code*** which provides:

> 31. (1) **Arrest for breach of peace** – Every peace officer who witnesses a breach of the peace and everyone who lawfully assists the peace officer is justified in arresting any person whom he finds committing the breach of the peace or who, on reasonable grounds, the peace officer believes is about to join in or renew the breach of the peace.

[38] As I understand Ms. MacInnis' argument on this point, Section 31.(1), on plain reading, does not contemplate arrest for an anticipated breach of the peace. The Section only empowers a peace officer to arrest if there is a breach of the peace is being committed, or if there are reasonable grounds to believe that a person is about to join or renew a breach of the peace.

[39] In support of this position, Ms. MacInnis relies of the reasons contained in a case annotation to ***Hayes v. Thompson***, 1985 CanLii 151 (BCCA). The annotation,

written by Bruce Archibald, argues that the "very careful statutory language" found in Section 31.(1) "omits to authorize arrest for someone about to commit a breach of the peace or where an apprehended breach of the peace is thought to exist". Nonetheless, courts, including the British Columbia Court of Appeal, maintain that a common law power exists. In the face of the ongoing judicial reliance on the common law, Mr. Archibald makes the point that legislative action is required to clarify the status of the law respecting apprehended breaches of the peace.

[40] With respect to Mr. Archibald's analysis, and his plea for clarity in this area, it cannot be said that his view represents the current state of the law. There have been numerous cases which have found that police have common law authority to arrest for apprehended breach of the peace.

[41] In ***Hayes***, *supra*, the court reviewed considerable legal authority and held at p.12 that "….The duty to preserve the peace requires a peace officer to have the power to arrest and, in the absence of a statutory power, the source of that power could only be from the common law".

[42] The reasons in ***Hayes*** were considered by the Ontario Court of Appeal in ***Brown v. Durham Regional Police Force*** 1998 CarswellOnt 5020. In ***Brown***,

Justice Doherty considered the scope of the police power when acting in furtherance of their duty to keep the peace. The trial judge in the present case quoted extensively from the reasons in ***Brown*** in support of her conclusion that the police have a common law power of arrest for an apprehended breach of the peace.

[43] If there was any doubt that such a power exists and is binding in our jurisdiction, reference is made to the decision of our Court of Appeal in ***R. v. C.E.***, *supra*. At para. 36, Justice Fichaud adopted the reasons in ***Brown***:

> [36] In the Court of Appeal, the Crown submitted that the trial judge erred by not considering whether CE could have been arrested for an apprehended breach of the peace….I need not comment whether such a threat of damage to the sister's property would be "imminent" and "substantial" breach of the peace under the common law definition stated by Justice Doherty in *Brown v. Durham*, at p. 74. The analysis does not reach that point.

[44] Accordingly, I find that the trial judge did not err in finding that a common law power exists to arrest for apprehended breach of the peace.

[45] In my view, the real issue on this appeal is whether the trial judge erred in her application of the legal standard to the facts before her.

Issue 2 - If such a common law power exists, did the trial judge err in the application of the law in the circumstances of this case?

[46] The standard of review on this issue requires deference to the trial judge. It demands a review of the trial judge's objective assessment of the officers' belief as to whether a breach of the peace was imminent and that the risk was substantial. As articulated by Justice Doherty in ***Brown,*** *supra*:

> 74 Two features of the common law power to arrest or detain to prevent an apprehended breach of the peace merit emphasis. The apprehended breach must be imminent and the risk that the breach will occur must be substantial. The mere possibility of some unspecified breach at some unknown point in time will not suffice. These features of the powers to arrest or detain to avoid a breach of the peace place that power on the same footing as the statutory power to arrest in anticipation of the commission of an indictable offence. That is not to say that the two powers are co-extensive. Many indictable offences do not involve a breach of the peace, and, as indicated above, conduct resulting in an apprehended breach of the peace need not involve the commission of any offence. Both powers are, however, rooted in the recognition that the intervention is needed to avoid the harm which is likely to flow in the immediate future if no intervention is made. To properly invoke either power, the police officer must have reasonable grounds for believing that the anticipated conduct, be it a breach of the peace or the commission of an indictable offence, will likely occur if the person is not detained.
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> …
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> 76 In deciding whether the ancillary power doctrine justifies these detentions, I adhere to the fact specific inquiry required by the doctrine. The police purpose behind the detentions, the nature of the liberty interest interfered with, the extent of the interference, and the need to employ the impugned means to effectively perform a duty placed upon the police must all be taken into account.

[47] A review of the relevant portions of the reasons in ***Brown*** reveals the underlying philosophy relied upon by Justice Doherty. The need to balance police power and individual liberty in an infinite variety of circumstances makes "bright-line" rules impossible to formulate. The ancillary power doctrine is the means by which the court strikes the balance. The doctrine recognizes that police have a duty to prevent crime, keep the peace and "protect life". It requires police to take proactive measures when appropriate and permits the police to take reasonable steps to prevent breaches of the peace.

[48] In her decision, the trial judge found that the officers had concerns that were "not frivolous or unsubstantiated". Ms. MacInnis was "extremely intoxicated" which gave rise to "grave concerns" for her physical well-being and health. There was no one to look after her and it was a cold night in March with icy road conditions. She was about to leave a private residence. There was no one at her home to supervise her. These findings alone are at least some basis for the conclusion that there was an imminent and substantial risk.

[49] Most controversial on this appeal was that the officers' subjective beliefs as to imminent and substantial risk were based in large measure upon their past contact with Ms. MacInnis. They had known her to have mental health issues.

Their past experience was that when intoxicated, she was volatile and capable of general criminal behaviour. Her criminal behavior included past assaults on police.

[50] It was past knowledge that was the foundation of the officer's assessment as to the "consequences should she be permitted to leave the MacDonald residence". The evidence was that these consequences included a risk to the public, a risk of criminal behavior and a risk to Ms. MacInnis' personal safety. The evidence supported that all of these were substantial risks. These risks were triggered as soon as Ms. MacInnis left the residence. This was clearly imminent in the circumstances.

[51] The trial judge found that the officers "acted on a reasonable basis". She was required to make an objective assessment as to the sufficiency of the officers' subjective beliefs and the reasons confirm that the trial judge undertook this assessment.

[52] Ms. MacInnis argued that there was insufficient evidence that a breach of the peace was imminent and the risk substantial. At the point of arrest, she was compliant with the request to leave. In her view, some overt act or statement was required to establish the required grounds. In support of her position, Ms. MacInnis

relied on a number of cases where such overt acts or statements had been found as the basis for the arrest.

[53] I agree that there will be instances where an overt act or clear statement may be required to establish the basis for the arrest. I disagree that a general rule exists that requires such evidence as a basis for an arrest. I further disagree that such evidence was required in this case.

[54] The distinguishing feature of this case was the extensive knowledge and experience that the officers had with respect to Ms. MacInnis. This gave them a basis to predict her behavior and her reaction to the circumstances. The police should be permitted to rely on their knowledge and experience if it is a reasonable approach in the circumstances. It would be impractical and artificial in my view to ask police to put aside such knowledge and experience in the types of assessments they required to make. It will always be the function of the trial judge to determine whether such knowledge and experience discharge the requisite legal standard.

[55] In the present case, the trial judge embarked upon an assessment as to the reasonableness of the officers reliance upon past knowledge and she found that the officers' beliefs and consequent concerns provided the requisite basis for the arrest.

[56] In my view, the trial judge correctly instructed herself on the law and then properly approached the required assessment. Accordingly, I see no basis to disturb the trial judge's Decision.

Issue 3 - Did the trial judge err in law by finding that Ms. MacInnis assaulted Officers Wade and Prasad.

[57] Ms. MacInnis concedes that if her arrest was lawful, her conduct amounts to an assault. It is therefore unnecessary to consider this issue any further.

Conclusion

[58] Ms. MacInnis' appeal was bifurcated by agreement. The appeal of the convictions entered by the trial judge is dismissed. The appeal as to sentence will be heard as scheduled by the Court.

Gogan, J.