S.C.C. No. 02287

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Clarke, C.J.N.S.; Matthews and Chipman, JJ.A.

BETWEEN:	
JAMES DOUGLAS HILTZ	**E. R. Saunders for the Appellant**
Appellant	
- and -	
HER MAJESTY THE QUEEN	A. C. Reid for the Respondent
Respondent	
	Appeal Heard: December 10, 1990
	Judgment Delivered: December 10, 1990

THE COURT: The appeal is allowed, the conviction is set aside and a new trial is ordered as per oral reasons for judgment of Chipman, J.A.; Clarke, C.J.N.S. and Matthews, J.A., concurring.

The reasons for judgment of the Court were delivered orally by

CHIPMAN, J.A.:

The appellant appeals from his conviction following a trial in the Supreme Court before a jury on a charge that he:

> "did assault Richard MacKay, a Peace Officer, to wit: a Police Constable for the Town of Bridgewater, engaged in the execution of his duties contrary to Section 270(2)(a) of the Criminal Code of Canada."

In the early morning hours of October 24, 1989, Constable MacKay of the Bridgewater Town Police and two other officers responded to a call on LaHave Street in connection with a disturbance. On arrival at their destination they found evidence of a disturbance, and the occupants of the residence were very upset. Constable MacKay saw the appellant there and thought he recognized him as a person who was wanted by the police. He testified that he knew that there were outstanding warrants for the appellant's arrest. When Constable MacKay asked the appellant his name, the appellant gave a fictitious one. The officers then responded to another call from next door and following investigation there, Constable MacKay became certain that the appellant was a person who was sought by the police.

MacKay returned to the location of the first call and found the appellant in a car. He told him that he was arresting him on a warrant at the Bridgewater Detachment. He stated that this warrant was for assault causing bodily harm and that there was another warrant for property damage. The appellant was given

his Charter rights to counsel and a police warning. He was escorted to the police car at which point he engaged in verbal confrontation with one of the occupants of the second residence to which the police had been called. As Constable MacKay was getting the appellant into the police car, he suddenly kicked the constable hard in the abdomen just above the groin, knocking him off balance. The other officers eventually subdued the appellant who was then taken to the station and in due course charged with the two offences for which the warrants were issued and an offence arising out of the disturbance on LaHave Street.

The appellant has raised a number of grounds, only one of which need be dealt with. The appellant's counsel takes the position that the Crown failed to establish that Constable MacKay was engaged in the execution of his duty at the time of the assault, and that the trial judge improperly instructed the jury on this issue.

It is not disputed that the Crown must, in order to establish that the officer was in the execution of his duty, prove that he was authorized to make the arrest in question. It is an essential ingredient of the offence charged that the assault take place while the officer was exercising some power or performing some duty imposed on him either by common law or statute. See R. v. Corrier (1972), 7 C.C.C. (2d) 461 at 464. Constable MacKay was clearly involved in the duty of investigating a disturbance on LaHave Street. The Crown's position is that he was entitled to make this arrest, as he did, without warrant. Section 495(1)(c) of the Code provides:

> 495. (1) A peace officer may arrest without warrant
>
> . . .
>
> (c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found."

The only evidence about the arrest was that MacKay told the appellant that he was under arrest for assault causing bodily harm on a warrant outstanding in the Bridgewater Detachment and that there was also a warrant outstanding for him for property damage. He said that he knew the warrants were outstanding. The constable did not give evidence in so many words as to the grounds for his belief, if any, that the warrants met the requirements of s. 495(1)(c) of the Code. The warrants were not put into evidence at the trial. Constable MacKay also made it clear that he was not arresting the appellant with respect to the alleged assault by the appellant on one LeGay on the evening in question.

The existence of reasonable grounds for belief as referred to in s. 495(1)(c) of the Code must be established as part of the Crown's case. In Storrey v. R. (1990), 75 C.R. (3d) 1, Cory, J., speaking for the Supreme Court of Canada said at p. 9 with respect to s. 450(1) of the Code (now s. 495(1)):

> "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."

The issue whether the officer had the requisite grounds for belief was therefore one that the jury had to resolve. In giving his charge, the trial judge said:

> "So, you have two reasons - you have evidence of two reasons for the arrest - one being the assault on LeGay and the other being the arresting on the Warrants. That's in the evidence. There is no doubt that when Constable MacKay and the other officers were called to number 638 that they were answering a complaint and that that was in the execution of their duty. It's for you to find that they were, but I'm suggesting to you that - and you're not bound by my suggestion in any way - that certainly, it's not difficult to find that they were in the execution of their duty in responding to that call. They were also within the execution of their duty in responding to the second call, and if you accept the evidence of Constable MacKay that he was arresting the accused for the assault on LeGay, then he was acting in the execution of his duty in making that arrest because he had evidence that there was an assault and under the law, I'm directing you that if he was arresting for that purpose, that under the law in these circumstances that it was a proper arrest.
>
> I'm also suggesting to you, as far as the law is concerned, that if you were to find that he was arresting him on the Warrants that that also would be a proper arrest. As far as the law is concerned, there are outstanding Warrants directed to a peace officer in the territory. Generally, the

> territory is Nova Scotia and the order is directed to any peace officer in the province of Nova Scotia. Any peace officer has the right to make the arrest. Now, so if the reason was the outstanding arrests, it's still within the execution of his duty. That's the duty of the peace officer."

In the first place, the evidence did not support the conclusion that Constable MacKay was arresting the appellant for an assault on LeGay.

In the second place, it was not made clear to the jury that they must make the essential determination whether Constable MacKay had, in making the arrest, the reasonable grounds referred to in s. 495 of the Code.

In the result, we believe that there was misdirection by the trial judge. Pursuant to s. 686(1)(a) and s. 686(2) of the Code, we allow the appeal and order a new trial.

David K. Cooper
J.A.

Concurred in:

Clarke, C.J.N.S.

Matthews, J.A.

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CANADA
PROVINCE OF NOVA SCOTIA

S.B.W. 1557

IN THE SUPREME COURT OF NOVA SCOTIA
TRIAL DIVISION

BETWEEN:

HER MAJESTY THE QUEEN

- and -

JAMES DOUGLAS HILTZ

(T-R-I-A-L)

HEARD BEFORE:	The Honourable Mr. Justice Nunn and Jury
PLACE HEARD:	Bridgewater, Nova Scotia
DATE HEARD:	May 9 and 10, 1990
COUNSEL:	C. Lloyd Tancock, Esq., for the Crown
	E.R. Saunders, Esq., for the Defence