PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Fleet*, 2015 NSPC 92

Date: 20151021
Docket: 2793474, 2793475 & 2793476
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

David Richard K. Fleet

Decision on *Voir Dire*

Judge:	The Honourable Judge Timothy Gabriel, J.P.C.
Heard:	September 2, 2015, in Dartmouth, Nova Scotia
Oral Decision	October 21, 2015
Charges:	252(1), 253(1)(a) and 254(5) of the Criminal Code of Canada
Counsel:	Scott Hughes, for the Crown (September 2, 2015) William Mathers, for the Crown (October 21, 2015) David Grant, for the Defence

Gabriel, J.P.C. (Orally):

[1] We are here for a decision with respect to the *voir dire* held in relation to Mr. Fleet. This matter was heard on September 2nd, 2015 after which the decision was reserved, in order to give counsel opportunity to provide further written submissions, and also to provide time for the Court to consider them.

[2] At 8:25 p.m. on September 12th, 2014, Halifax Regional Police were dispatched to investigate a possible motor vehicle hit and run at the Army Navy Club at Main Street and Lakecrest Drive in Dartmouth, Nova Scotia.

[3] The complainant's Hyundai Elantra had been struck by another vehicle, which had apparently fled the scene. The police arrived about 13 minutes after the collision was said to have occurred, and quickly gathered some information that pointed to the accused as a suspect in the matter. The accused was known to the police, whose records listed him as a resident of 205 Main Street in Dartmouth. When they checked his vehicle registration records, it was discovered that Nova Scotia Registry of Motor Vehicles also had him listed at that address.

[4] Police also had a record of having encountered him at 45 Mountain Avenue, Dartmouth. They had, on one earlier occasion, spoken with him there in relation to an unrelated matter.

[5] The attending officers checked both locations and located the accused's truck at 45A Mountain Avenue where it was parked on the wrong side of the street. The truck was also damaged. There was damage to the front bumper on the passenger side (which still had a piece of shrubbery caught in it) as well as damage to the rear quarter panel, scraped paint, dents in the rear passenger door, and corresponding paint transfer damage to the door as well as damage to the hood. This was considered to be consistent with the damage that had been inflicted upon the complainant's vehicle, which had been rendered undriveable due to what had been done to its front driver's side bumper and panel near the hood.

[6] The homeowner at 45A Mountain Avenue is Carol-Ann Crawford. She was in the process of having a birthday celebration for one of her children. According to the police, three conversations between her and they ensued.

[7] The first concerned whether or not the police had a warrant. The second occurred after the police had sent one of their members to get a *Feeney* warrant to enter the house. A third conversation took place after Ms. Crawford exited her front door to speak with the police. She was thereupon arrested for obstruction and public mischief.

[8] The officers claim that they had been told initially by Ms. Crawford that Mr. Fleet was not in the residence, and that he, in fact, had initially been there, but had walked home. (It should be noted that she denies having said this.) They say that they were also told that, in any event, they could not enter her home without a warrant. Then they say (conversation two) that she later relented and told them that the accused was inside and drinking, but would not come to the door.

[9] The third conversation occurred (as indicated) when she went outside of the home and spoke to the officers and was arrested. She was placed in handcuffs at the time, and thereupon gave permission to the police to enter her premises. They found the accused in one of the upstairs bedrooms laying on the bed with an empty wine glass on the adjacent stand, as well as with an empty Keith's beer can in the vicinity.

[10] Mr. Fleet vehemently insisted that he was neither prepared to speak with the officers, nor to comply with the breath demand that they made of him. He was arrested for what is known as "leaving the scene of an accident", contrary to section 252(1), impaired operation of a motor vehicle, contrary to section 253(1)(a) and refusal of the breath demand, contrary to Section 254(5). Upon their arrest of Mr. Fleet, the police officers removed Ms. Crawford's handcuffs. She was released and the police took Mr. Fleet away to be processed.

[11] The accused argues that his rights as contained in Sections 7, 8 and/or 9 of the **Canadian Charter of Rights and Freedoms** have been infringed. He further submits that, if I accept his contentions on any one of these bases, the proper remedy under Section 24(2) of the **Charter** is to "exclude all evidence obtained within the home". This includes, presumably, the evidence of the breath demand being put to Mr. Fleet while inside the premises, and his refusal of it. It is for this reason that the *voir dire* was held. My decision will address these issues.

[12] In almost every situation in which the court is not presented with an agreed statement of facts, there are discrepancies between the testimony of some witnesses, both internally and *inter se*. Sometimes these discrepancies are contextual or perceptual, sometimes they amount to fundamentally different

observations. It is therefore useful to bear in mind that this is a *voir dire*. As I stated in the decision of *R. v. Boliver*, 2012 NSPC 33, paragraphs 32-35:

> [32] While agreement between counsel is anticipated (following my Decision in this Application) as to the manner in which the evidence herein is to be incorporated into the trial proper, there is, as of yet, no such consensus between the parties.
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> [33] There may be other evidence called when the trial starts. Either the Crown or the Defence may do so. They may agree that all or only a portion of the evidence on this Application should be admitted into the trial proper. If they cannot agree on that issue, I may have to rule upon it.
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> [34] Once the trial is concluded, the issue will be whether the Crown has proven beyond a reasonable doubt all of the elements of each offence that Mr. Boliver faces. That process essentially resolves itself into the question of "does reasonable doubt exist in relation to any of the elements of the offence", rather than "what is the truth of what happened that evening?". As indicated, the onus will be squarely upon the Crown at that time.
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> [35] A very different standard is in play with respect to Richard Boliver's present **Charter** Application. Here, the onus is upon the Applicant/accused, to satisfy me, on the balance of probabilities, that he has sustained one or more violations of his Charter protected rights. If so, I must then consider the appropriateness of the remedy that he seeks.

[13] Mr. Fleet carries the onus both of demonstrating the breach, and the appropriateness of the remedy which he seeks in the event that a breach is found. The Court heard from two Crown witnesses, Constable Scott Kuhn and Constable Allen MacLellan. The defendant (applicant) called one witness, Carol Anne Crawford. The accused elected not to testify at the *voir dire*.

[14] Although the accused cites Sections 7, 8 and 9 of the **Charter**, he has really only argued one, both in his brief and in the submissions before me (Section 8). For ease of reference, I will reproduce all three.

[15] Section 7 of the **Charter of Rights and Freedoms** states that:

> Everyone has the right to life, liberty and security of a person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[16] Section 8:

> Everyone has the right to be secure against unreasonable search or seizure.

[17] Section 9:

> Everyone has the right not to be arbitrarily detained or imprisoned.

[18] Although no particular attempt has been made by counsel to tie them to the specific **Charter** sections that have been cited, the accused's concerns appear to relate to the following:

1. The manner in which the police gained entry into 45A Mountain Avenue.
2. The arrest of the accused.

[19] In dealing with the first contention, (i.e., the manner which the police gained entry into 45A Mountain Avenue) I will also consider under this rubric, whether the accused has demonstrated that he had a reasonable expectation of privacy at this residence.

[20] The evidence satisfies me that the police properly followed an evidentiary trail that led them to discover the accused's vehicle at 45A Mountain Avenue. Constable MacLellan had spoken with the complainant, who had been inside the Army Navy Club (working at a fundraising event) when her vehicle was struck in the parking lot. She had been told by a witness that Mr. Fleet had been in the club drinking, and that later he been seen striking the complainant's car in the parking lot and driving off. The complainant passed this information along to the police, who then checked their records and discovered two addresses at which he might be found.

[21] What the police found when they checked the Mountain Avenue address was Mr. Fleet's truck, parked on the wrong side of the street and exhibiting what appeared to be fresh damage, consistent with that which had been inflicted upon the complainant's vehicle. So they did not proceed arbitrarily to Ms. Crawford's door. They had a legitimate investigative purpose in being there. The only problem was, Mr. Fleet was inside, and he wasn't prepared to come out.

[22] Despite the attempts of the Crown to thus portray the officers' situation (as they stood at Ms. Crawford's door) this was neither a case of "fresh pursuit" or "exigent circumstances" such as would permit warrantless entry into her residence. The police acknowledge that they had dispatched one of their number to seek a warrant in compliance with the parameters set out in the Supreme Court of Canada decision *R. v. Feeney* [1997] 2 S.C.R. 13, what is commonly referred to as a

"*Feeney* warrant". It appears simply fortuitous, from the police perspective, that Ms. Crawford came out of her residence before that warrant was obtained. This set off a chain of events which culminated in the police gaining entry without the warrant.

[23] So, the investigation that lead the police to Ms. Crawford's home could not be characterized as "hot pursuit" or "fresh pursuit" as it is sometimes called.

[24] In *R. v. Macooh* [1993] 2 SCR 802, it was noted;

> In general, and subject to further clarification which may be necessary in the particular factual situations before the courts, I consider that the approach suggested by R. E. Salhany in *Canadian Criminal Procedure* (5th ed. 1989), at p. 44, adequately conveys the meaning of hot pursuit:
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> > Generally, the essence of fresh pursuit is that it must be continuous pursuit conducted with reasonable diligence, **so that pursuit and capture along with the commission of the offence may be considered as forming part of a single transaction.**
>
> [Emphasis added]

[25] These events cannot be viewed as a "single transaction". As I stated earlier, the police were called to the Army Navy Club after the damage had been inflicted upon the complainant's vehicle. None of the investigating officers saw the incident. Although the trail that led them to Ms. Crawford's door was travelled relatively quickly, it was their investigation, not their pursuit of the accused, that brought them there.

[26] The Crown's argument with respect to what it has called "exigent circumstances" must suffer a similar fate. It is argued that Ms. Crawford, after initially refusing the police officers entry to her home and claiming that Mr. Fleet was no longer inside, eventually admitted that he was inside and that he was drinking. The Crown's argument is that the accused was engaged in so called "bolus drinking", and that this justified warrantless entry to prevent Mr. Fleet from "destroying evidence", i.e., evidence of his blood alcohol level at the time that the driving offence under investigation was committed.

[27] As indicated earlier, the best that I can conclude on a balance of probabilities is that the police took the opportunity to arrest Ms. Crawford when she exited the residence to speak with the officers on her step. But for that occurrence, it appears

that the police were content to wait for the *Feeney* warrant that was being sought. Viewed from this vantage, it would appear that the discussion of exigent circumstances was introduced simply to provide an alternative basis of justification for the police warrantless entry into Ms. Crawford's residence.

[28] The police gained entry into her home when she went out on her step. They told her she was under arrest (for obstruction) because she had initially told them (conversation number 1) that Mr. Fleet was not there. Once handcuffed, with her young children in the house, she granted the police permission to enter her home, whereby they were able to provide him with the breath demand and, once this was refused, to arrest Mr. Fleet for all of the offences with which he is charged: the Sections 252(1), 253(1)(a) and 254(5) offences.

[29] The accused (in his brief) argues that the consent extracted from Ms. Crawford by holding her and threatening her with arrest and prosecution (when she has four small children inside the house at a birthday party) is not a proper consent to entry, and amounts to a breach of Ms. Crawford's **Charter** protected rights.

[30] With respect, what is germane to this case is what can be done even if I were to agree with this contention. Certainly, in a contest between Ms. Crawford and the State, a close examination of all of the circumstances might (and I emphasize the word "might") lend some strength to the argument that Ms. Crawford's permission to enter her home was, in fact, extracted from her by duress created by the ostensible arrest and handcuffing. This must have been extremely stressful for her, given that she had recently undergone radiation treatment for cancer, and also had very young children inside for whom she was responsible.

[31] Assuming, without deciding, that the police breached Ms. Crawford's rights by entering her dwelling in this fashion, does this confer standing upon the accused to raise a **Charter** argument based upon a breach of those rights? In deciding this issue, I again have had recourse to the onus which Mr. Fleet bears. He must persuade me on a balance of probabilities that he has sustained a breach of one or more of his **Charter** protected rights. Ms. Crawford attempted to assert that Mr. Fleet lived there with her at 45A Mountain Avenue, in effect, that her residence was his as well.

[32] According to the Supreme Court of Canada decision *R. v. Edwards* [1996] 104 C.C.C. (3d) 136, the accused must show an infringement of his own reasonable expectation of privacy, which is to be determined on the basis of the totality of the circumstances, and in particular:

> … (i) presence at the time of the search. (ii) possession or control of the property or place searched; (iii) ownership of the property or place; (iv) historical use of the property or item; (v) the ability to regulate access including the right admit or exclude others from the place (vi) the existence of a subjective expectation of privacy; and (vii) the objective reasonableness of the expectation.

[33] Ms. Crawford did not testify, either on chief or cross-examination, as to any of the things that one would ordinarily expect to hear with respect to such a claim. The Court would ordinarily expect to hear things such as where Mr. Fleet gets his mail, how long he has lived with her, if he pays bills for the residence, what work he does around the house, why he continues to maintain his other separate residence, why the records at the Registry of Motor Vehicles shows him as residing at this other residence.

[34] Even after the Court questioned Ms. Crawford briefly on the topic, what was learned amounted merely to her contention that Mr. Fleet has lived with her for over a year, helps her around the house (because her health is too fragile to do any housework) and that he pays some bills. After being prompted in this regard, counsel still chose not to ask any further questions of her in this vein after being given the opportunity to do so by the Court. Mr. Fleet chose not to testify at all.

[35] As such, the evidence is insufficient to satisfy me that the police entry into 45A Mountain Avenue on September 12th, 2014 constituted an entry into a residence which could be considered Mr. Fleet's home residence or, alternatively, that Mr. Fleet had a reasonable expectation of privacy while therein. Ms. Crawford's limited evidence on the point, which was extracted in a "tooth pulling like" fashion during questioning by the Court, was not accepted. In any event, it was far too little in the face of the evidence that Mr. Fleet maintained another residence of his own at 245 Main Street, where the records of the Registry of Motor Vehicles and his other identification documentation also have him residing.

[36] It follows, therefore, that his claim (in this application) is predicated upon what can, at most (again it is not necessary to decide the issue) be considered to be a breach of Ms. Crawford's **Charter** protected rights, which recourse is not available to him.

[37] Indeed, as discussed briefly already, it is difficult to envision what relief would be available to Mr. Fleet even if I had concluded that:

(a) Police entry into 45A Mountain Avenue was gained by coercion of Ms. Crawford, and

(b) That Mr. Fleet somehow was able to utilize that fact as tantamount to a breach of one or more of his own **Charter** protected rights.

[38] The only thing that happened to Mr. Fleet after the police entered the residence was the administration of the breath demand and its refusal by the accused. As the Ontario Court of Appeal noted in the decision or *R. v. Ha*, 2010 ONCA 433, at paragraphs 7 and 8:

> [7] In **R. v. Hanneson** (1989), 49 C.C.C. (3d) 467, this court considered whether a **Charter** breach insulated a detained person against liability for subsequent criminal acts. Justice Zuber, speaking for the court, said the following:
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> > Similarly, despite a breach of s. 10(b), a detained person will attract criminal responsibility for crimes committed by words e.g. threatening death or offering a bribe. Section 10(b) has as its object the provision of counsel to those under investigation for crimes already committed in order that they might be advised with respect to making disclosure, the provision of evidence, etc. regarding of those crimes. Section 10(b) cannot possibly relate to crimes yet to come.
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> [8] In our view, the rationale in **Hanneson** applies equally here where there was a s. 9 breach as well as breaches of s. 10 of the **Charter**. The statements made by the respondent constituted the *actus reus* of the new offence. They did not flow causally from the **Charter** breaches.

[39] Although in *Ha* the breach in question related to the accused's Sections 9, 10(a) and 10(b) **Charter** rights, the essential point to grasp is that, in this case, (like *Ha*) the refusal made by Mr. Fleet only arose after the police had gained entry to the Crawford residence, read him a valid breath demand, and provided him with his rights to counsel. There is no evidence that this refusal was affected in any way by the manner in which the police gained entry to the premises in which Mr. Fleet happened to be situate. It is his response, after the entry and after the demand, **Charter** rights and caution were put to him, that is alleged to constitute an unequivocal refusal, and to comprise the *actus reus* of the Section 254 charge. This only arose at that moment.

[40] In sum, the evidence does not satisfy me that there was an unreasonable search or seizure effected in relation to Mr. Fleet carried out on September 12th, 2014, and therefore I find that no Section 8 **Charter** breach has been established.

[41] Similarly, I have concluded that Mr. Fleet was not arbitrarily detained or imprisoned and consequently that he has sustained no Section 9 **Charter** breach. I will explain.

[42] The police attended the Army Navy Club on September 12th after receipt of a complaint of someone colliding with a parked vehicle, damaging it and leaving the scene. The investigation suggested that was Mr. Fleet involved and the police located him at 45A Mountain Avenue, where they observed his vehicle replete with freshly inflicted damage, still sporting shrubbery stuck in the grill, all of which damage was considered to be consistent with what had been sustained by the complainant's vehicle. They had evidence that Mr. Fleet had consumed alcohol before leaving the club, and of his belligerence towards the police when they located him at Ms. Crawford's residence.

[43] Sections 495(1) and Section 495(2) of the **Criminal Code** read as follows:

> 495. (1) A peace officer may arrest without warrant
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> (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;
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> (b) a person whom he finds committing a criminal offence; or
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> (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.
>
> (2) A peace officer shall not arrest a person without warrant for
>
> (a) an indictable offence mentioned in section 553,
>
> (b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction, or
>
> (c) an offence punishable on summary conviction,
>
> in any case where…

The section then goes on to list the grounds when arrest is not necessary.

[44] Clearly, the offence pursuant to section 252(1), with which Mr. Fleet was subsequently charged (along with offences pursuant to Section 253(1)(a) and Section 254(5)) is a hybrid offence, one which would bring it within the ambit of Section 495(1)(a). The evidence satisfies me that the police had the subjective belief that Mr. Fleet had committed an offence pursuant Section 252(1) when they

arrived at Ms. Crawford's door, and that they had reasonable grounds (or an objective basis, if you will) for that belief.

[45] Later, inside the residence, Mr. Fleet refused the breath demand, thereby providing a subjective and objectively reasonable basis for belief that an offence under section 254(5) had been committed. Therefore, for the purposes of this *voir dire*, the evidence does not satisfy me that Mr. Fleet's arrest was unlawful nor that his Section 9 **Charter** rights were infringed.

[46] As to the allegation of infringement of Mr. Fleet's Section 7 **Charter** right, (which entitles him not to be "deprived of his life, liberty and security of the person except in accordance with the principles of fundamental justice") my understanding of the Supreme Court of Canada decision in the reference *Re: B.C. Section 94(2) of the Motor Vehicle Act*, [1985] 2 SCR 486, suggests that the term "fundamental justice" includes principles pertaining to natural justice, but also may include principles of judicial process, and some of the other edifices upon which our legal system rests. They do not amount to merely procedural considerations. Whether any particular principle *per se* rises to the level of a "principle of fundamental justice" as contemplated by Section 7, requires an analysis and evaluation of its role and rationale in that legal process.

[47] In this case, Section 7 has been asserted by the accused in an omnibus, rather than specific, manner. I have concluded that there were no breaches of Mr. Fleet's rights as protected by Sections 8 or 9 of the **Charter**. He has been and will be subject to a trial on the basis of the evidence presented at that time. There is nothing specific suggested, nor to my mind could it be suggested, that might rise to the level of a denial of a principle or principles of fundamental justice in the manner in which Mr. Fleet has been treated, as contemplated by Section 7 of the **Canadian Charter of Rights and Freedoms**.

[48] As touched upon earlier, even if I had concluded that his contention (that one or more of his **Charter** protected rights had been breached) had merit, the only thing that happened after the police entered the Crawford residence was his refusal of the breath demand that was administered. I have previously explained why evidence of the demand and his refusal cannot and should not be excluded under these circumstances. Other than that, there is no evidence to exclude. Moreover, this is not even close to what I would consider to be one of those very rarely encountered "clearest of cases" which would warrant a stay of any or all of the charges that Mr. Fleet is facing.

[49] Therefore, even if I had been disposed to consider that a **Charter** breach was made out, I would not have granted the accused any remedy under Section 24(2) of the **Charter** in this case. Mr. Fleet's application is accordingly dismissed.

Timothy Gabriel, J.P.C.