PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. MacLaren, 2012 NSPC 120

Date: 2012/11/30
Docket:2446713; 2446714
Registry: Truro

Between:

Her Majesty the Queen

v.

Danielle Christian MacLaren

Judge:	The Honourable Judge Gabriel
Heard:	October 25, 2012 and November 30, 2012, at Truro, Nova Scotia
Oral decision:	November 30, 2012
Charge:	Criminal Code ss. 88 and 90
Counsel:	Paul Drysdale, for the Crown David Mahoney , for the defence

Gabriel, JPC

Introduction

[1] The facts in relation to this case are not complicated. Constable Karen Degroot, a fifteen year veteran of the Truro Police Department, was on patrol on the evening of April 23 2012, working night shift with Constable Reynolds. The officers observed a vehicle parked on the far south end of Victoria Park, at 10:20 pm. The park was closed at that time, so Degroot and her colleague approached the vehicle to find out why it was there. The accused was sitting in the passenger seat with her purse at her feet. A male was seated behind the wheel.

[2] Upon learning the accused's identity, the officers discovered that there was an unendorsed warrant outstanding with respect to her. Ms. MacLaren was directed to accompany Constable Degroot, and thereupon picked up her purse, accessed some items that were contained in it, and returned the purse to the floor of the vehicle, at her feet. This purse was white, with a clasp, and with dimensions of approximately eight by eleven inches.

[3] It was suggested to the accused that she should take her purse and belongings with her because, due to the unendorsed nature of the warrant, she would be spending the night in cells. Ms. MacLaren did so.

[4] The accused, after being chartered and cautioned, was taken to the Truro police station, arriving there at approximately 10:39 pm. Upon arrival her belongings, including her purse, were taken and inventoried.

[5] Sometime thereafter Cst. Reynolds searched the purse, as he put it, "for Officer safety" reasons. He found some medication and cosmetics in there, among other items. These latter items included a so-called ASP baton, which had not been visible prior to the search.

[6] This ASP is an item similar to one which is standard police issue, and is worn by an Officer, as Cst. Degroot testified, in a holster at her waist over her uniform. She and her colleagues are also given training with respect to the use of it.

[7] When the baton's insert is activated, it expands to approximately three times its original length, somewhat in the manner of a flick knife. Degroot noted that the use of such a weapon by a Police Officer constitutes the second highest level of force available. By necessary implication, it is the last such level before use of a firearm is undertaken.

[8] Both Officers testified they had not received any prior complaints about Ms. MacLaren's carriage of the baton. Moreover, as Cst. Degroot conceded, it is quite likely that the only reason the accused brought her purse with her to the police station was because the Officer had suggested that she do so.

[9] The accused explained to the Police that night that she carried the ASP for personal protection. She repeated this when she testified, and further elaborated that it was specifically for protection against an estranged spouse. He is someone whom she considers to be dangerous. He is known to police, and he had kicked in the door to her residence three times in the previous five weeks. She purchased the ASP less than a week after the last such occurrence.

[10] The accused maintains that when she placed the baton in her purse, her purpose was not to hide it. Rather, it is simply easier to carry it that way. As she points out, this is the same reason she put her medication, money, and cosmetics in there.

[11] Ms. MacLaren has been charged that she, while "not being authorized under the Firearms Act to carry a concealed weapon, to wit: retractable baton, did carry it concealed, contrary to Section 90 of the Criminal Code; and further that she did have in her possession a weapon, to wit: retractable baton, for a purpose dangerous to the public peace, contrary to Section 88 of the Criminal Code".

Issues

[12] I must consider the following :

I. Was the ASP baton being "carried" by the accused?

II. Was the ASP baton a "weapon" within the meaning of ss. 90 and 88 of the Criminal Code, in the circumstances of this case ?

III. Was it "concealed"? , and

IV. With respect to the Section 88 charge, if the ASP baton is a weapon within the meaning of ss. 88 and 90 of the Criminal Code, did the accused possess it "for a purpose dangerous to the public peace" ?

Analysis

I. Was the ASP baton being "carried" by the accused?

[13] Yes, it unquestionably was. It was in her purse, which was initially found directly at Ms. MacLaren's feet while she was occupying the passenger seat of the vehicle. Moreover, she picked up the purse and brought it with her to the police station. The Defence has not taken issue with the Crown's contention in this regard, and I find that this element of the offence has been established.

II. Is an ASP baton a "weapon" within the meaning of Section 90 of the Criminal Code?

[14] Section 90 of the Criminal Code reads as follows:

> "Every person commits an offence who carries a weapon, a prohibited devise or any prohibited ammunition concealed, unless the person is authorized under the Firearms Act to carry it concealed"

[15] "Weapon" is defined in Section 2 of the Code to mean:

> "Anything used, designed to be used or intended for use in
>
> (a) causing death or injury to any person or,
>
> (b) for the purpose of threatening or intimidating any person and without restricting the generality of the forgoing includes a firearm"

[16] In Section 84 of the Code, we find several other related definitions. For example, " prohibited device" means:

> "(a) any component or part of a weapon, or any accessory for use with a weapon that is prescribed to be a prohibited device...

[17] "Prohibited weapon" means:

> "(a) a knife that has a blade that opens automatically by gravity or centrifugal force or by hand pressure applied to a button, spring or other device in or attached to the handle of the knife, or
>
> (b) any weapon, other than a firearm, that is prescribed to be a prohibited weapon...

[18] While there was no suggestion that the ASP is either a prohibited device, or prohibited weapon, the accused states that she purchased it specifically for protection against an ex partner who had repeatedly behaved in a violent manner toward her. At the very least, Ms. MacLaren had it to "intimidate" or "threaten" him if he came after her. If these measures proved to be ineffective, she would use it to defend herself.

[19] An ASP baton could fulfill other roles in different fact scenarios (see, for example, the discussion of collapsable batons as "weapons" in *R. v. Truong*, 2004 ABPC 183, and *R. v. Pleysier*, 2010 ABPC 267). However, in the circumstances of this case, given the specific purpose for which the accused carried it, it was a "weapon" within the meaning of section 90 (and also within the meaning of section

88, more on which will be said later), because it meets the definition thereof in Section 2.

Issue III Was the weapon "concealed"?

[20] Ms. MacLaren says that she did not place the baton in her purse with the intention of concealing it. She placed it there simply as a matter of convenience, in the same manner that her wallet, various cosmetics, and medication were placed there. She indicated that she found it easier, as many women do, to carry it and a large number of other things in her purse, rather than in her pockets or some other receptacle.

[21] Moreover, Ms. MacLaren's counsel points out that there was neither an attempt to conceal the purse, nor any hesitation on her part in bringing the purse to the police department with her. The accused did so, at Officer Degroot's suggestion, when she was told that she would be kept in custody for the night.

[22] In weighing the evidence, I accept Ms. MacLaren's explanation of why she placed the baton in her purse, in all of the circumstances. She found it less

cumbersome and easier to carry the object that way. Does this finding provide her with a defence to the charge under section 90?

[23] It is trite to observe that almost all offences require both a *mens rea* and an *actus reus*. Sections 90 and 88 of the Criminal Code are no exceptions. Here, the *actus reus* or physical component of the offence occurred when the accused placed the baton (which, as was earlier noted, and in these circumstances, is a weapon within the meaning of that section) in her purse, and carried it with her.

[24] However, with respect to *mens rea,* she contends that it is necessary for the Crown to establish that she did so with a goal or objective to "conceal it". Her counsel further argues (and I have so found), that her purpose was merely one of convenience.

[25] The Crown, if I may paraphrase, argues that I need only to find that Ms. MacLaren intended to place the weapon in her purse. Since the result of that act was to conceal the baton (as both Officer Degroot and the accused testified) then the requisite *mens rea* is proven.

[26] Both sides have made reference to the Supreme Court of Canada decision in *R v. Felawka,* [1993] 4 SCR 199. In that case, some of the facts are comparable, but, as is usually the case, some are not.

[27] Mr. Felawka had gone target shooting and decided to use public transportation to return home, with his rifle. When he boarded the Sky Train he had the rifle (with a live round in it) wrapped in his jacket. While he did intend to conceal it, he did so because he did not wish to alarm anyone else using the train. Two of his fellow passengers, nonetheless, became concerned and notified a Sky Train employee. When that employee approached Mr. Felawka about the concern, he laughingly stated that he carried the gun because he was "going on a killing spree". The trial Judge accepted the accused's explanations, both that this tasteless remark had been made in jest, and as to his purpose in wrapping the rifle in his jacket.

[28] Mr. Felawka was convicted under section 89 (now section 90) at trial. The British Columbia Court of Appeal (when the case reached that level) upheld the conviction and determined that his innocent purpose in concealing the weapon did not constitute a defence. It was further noted that not even the most commendable

motive for concealing a "weapon" was available to an accused as a defence to a charge under Section 89 (now Section 90).

[29] The majority of the Supreme Court of Canada, after concluding that a firearm will always constitute a "weapon" for the purposes of Section 90, (this was before subsequent amendments to the Section had made this explicit) stated at paragraph 25:

> S. 89, (now s. 90) describes an offence comprised of three elements. The Crown is required to prove that the Accused is:(1) carrying (2) an object which is a weapon known to the Accused person to be a weapon (3) in such a way as to conceal it. What should be the requisite *mens rea* for this offence? Is it sufficient if the Crown establishes that the Accused intended to conceal the object he knew to be a weapon? That is, that he or she intended to remove the weapon from the knowledge or observation of others to keep it out of sight or to hide it. On the other hand, does the Crown have to prove that the Accused had the weapon and was concealing it for some unlawful purpose? There had been a number of cases which have dealt with this issue and they are not all in agreement.

[30] After reviewing the authorities, Cory J. continued at paragraph 30:

> ... Perhaps a solution can be arrived at by considering the aim or object of the section itself. There is something extremely menacing and intimidating about the presence of a naked weapon. There is something even more sinister in the presence of a concealed weapon. No doubt the legislators enacting s. 89 believed that weapons are usually concealed by persons on the way to commit crimes or after leaving the scene. Clearly then one of the goals of the section is to discourage the prospective bank robber who might be apprehended on the way to the bank with a sawed off shotgun

> concealed in his pant leg. Yet, I think the section has a wider aim. *All Canadians have the right to feel protected from the sinister menace of a concealed weapon. If it was ever thought that it was lawful to carry concealed weapons more and more Canadians might come to believe that it would be prudent for them to carry concealed weapons in order to defend themselves and their families.* This might lead to a vigilante attitude that could all too readily result in an increase in violence in Canadian society. Canadians...have every right to expect the concealment of weapons would also be prohibited or properly regulated. *To fulfill the aim and object of s. 89, it would then appear that the requisite intent or mental element should be that the accused intended to hide from others an object he knew to be a weapon.*
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> (Emphasis added)

[31] Does the act of "hiding" or concealing the weapon in question involve merely the intent to perform the act that effects the concealment, or does the act also have to be undertaken with a purpose to conceal it from others?

[32] In *R v Constantine* (1996), 46 C.R. (4th) 105 (Nfld. CA), Justice Gushue was dealing with an Appeal by an individual convicted of carrying a concealed weapon. The accused had been released from the police lockup and was apprehended carrying a knife (under a set of coveralls and two shirts) and in an intoxicated state, some hours later the same day.

[33] In allowing the Appeal and overturning the conviction, his Lordship did so on the basis that the Crown had not proven, to the requisite degree, that the knife had

been carried by the accused as a weapon at the relevant time. His reasons also featured the following discussion:

> To establish the offence of carrying a concealed weapon, it must be proved that (a) an accused was carrying a weapon as defined by the Code and (b) that such weapon was concealed. The trial judge found that while there was no evidence that the accused intended to use the knife, there was evidence that the accused had concealed the knife within his clothing. The judge did not directly canvass the issue as to whether the knife came within the definition of a "weapon" as it is defined in s. 2 of the Criminal Code.
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> The judge having found no intent on the part of the appellant to use the weapon, the prosecution attempted to establish that the appellant's hunting knife was a weapon "designed to be used … in causing death or injury to any person". The appellant argues that a hunting knife is not "per se" intended for use in causing death or injury to a person, but rather is designed for other legitimate purposes.
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> Courts have had considerable difficulty in dealing with this area of the law. Some courts have felt that the simple method of determining the three separate ingredients, i.e., (1) "carrying", (2) in a "concealed" manner, (3) an object that is a "weapon", is the proper approach. In other words, an absolute or at least strict liability approach.
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> The more favoured approach in recent years, however, appears to be one of treating "carrying"as a separate determination, but dealing with the issues of "weapon" and "concealed" together in the sense of the court's determining, either directly or by inference, from the facts and circumstances of a particular case what was the purpose of the accused.
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> Obviously, a handgun or a switch-blade knife or brass knuckles may generally be regarded as being weapons because they are designed to be such. Thus, in the absence of evidence to the contrary, the cases generally state that concealment of any of these may create the offence because unlawful purpose may be assumed or implied.

The same, however, cannot be said of a carving knife or a steak knife or a hunting knife, or many other objects which are intended for peaceful purposes. Thus, the key to the entering of a conviction in such matter has to be the establishing by the prosecution that the object is being concealed for an unlawful purpose. *This is, however, not necessarily an easy method of dealing with the problem in all cases because obviously the lines as to the nature of the object, the extent of the concealment and the determination of purpose can become easily obscured.*

...

The authorities seem to follow a standard pattern of the prosecution having of necessity to establish that an object which could be used for peaceful purposes was intended to be used as a weapon. Conversely, where the object in issue was one which could obviously be deemed to be a weapon because of its very nature, the evidentiary burden would fall on an accused to establish that no unlawful purpose was intended. One case which appears to have caused some problems within the courts of the country, however, is that of R. v. Felawka, 1993 CanLII 36 (SCC), [1993] 4 S.C.R. 199; 159 N.R. 50; 33 B.C.A.C. 241; 54 W.A.C. 241, where, by a four to three majority, the Supreme Court upheld a conviction of a person who was carrying a .22 calibre rifle wrapped in his jacket on his way home from target shooting. He was found guilty of carrying a concealed weapon because he intended to conceal it, he having stated, "it was not proper to carry it out in the open". It is interesting to note in that case the majority felt that a firearm as defined in s. 84 of the Criminal Code will always come within the definition of a weapon because it is expressly designed to kill or wound. *While mens rea is required to be proved to establish a s. 89 offence, that mens rea will be established if the Crown proves beyond a reasonable doubt that the accused concealed an object that he knew to be a weapon*, *without more.* Lamer, C.J.C., dissenting, was strongly of the view that it had not been shown that the accused was carrying a "weapon" within the meaning of s. 89. Further, in his view, the majority's interpretation of s. 2, which would include a firearm as a weapon regardless of its use or intended use, could produce unjust results.

Felawka does appear to deviate somewhat from the norm. However, in any event, it may be distinguished for our purposes because we are not here dealing with a firearm, but rather a hunting knife. *That object was not designed to kill or maim persons and therefore the matter of purpose or intent of the accused becomes most relevant. While there does appear to have been concealment of a sort by the appellant, the trial judge has expressly found that:*
"There is nothing to suggest that (the appellant) had (the knife) there for any evil or unlawful purpose, that he intended to use it in any way or that he intended to do any damage with it."

*(*Emphasis added*)*

[34] With respect, although the reference to "*evil or unlawful purpose*" is appropriate within the context of *Constantine* and some of the other cases that have employed it or something similar, it is not helpful here. The phrase may have some utility when the goal is to determine whether or not the item in question is a "weapon", but it has no application to cases where the item is undoubtedly a weapon by its very nature. Neither would it have application where (as here), the accused admits it was being carried for the purposes of self defence (ie. to threaten or intimidate or strike someone for that purpose, if the need arose). As previously discussed, this makes the baton a "weapon", in the circumstances of this case, since it is captured within the definition of the word contained in section 2 of the Code (supra).

[35] It is therefore not necessary for me to find that carriage of the baton for such a purpose is either "evil or unlawful" *per se*. Rather, what is appropriately considered are the implications that flow from my finding that the baton is a weapon, and how they bear upon the issue of whether it was "concealed".

[36] As noted in *Constantine* [supra], some Courts and authors have referred to the apparent focus of *Felawka* [supra] and later discussions, and concluded that the "weapon-ness" of the object is to be considered in tandem with whether it was "concealed". In this view, one consideration necessarily informs the other.

[37] If this interpretation of *Felawka* [supra] is correct, it involves a two (rather than three) part test, namely: (1) Was the item being "carried"? and, if so, (2) Was it a "concealed weapon?". This is apparently derived from the reference in paragraph 44 of Felawka (supra) :

> "It is therefore preferable that the mental element required be simply that the Accused, knowing the object carried to be a weapon, took steps to hide it from others."

[38] As noted, there is a distinction between the facts of *Felawka* [supra], and those of the case at bar. In the former, the accused's goal was to conceal the weapon in question (a rifle), albeit merely so as not to alarm his fellow passengers. In Ms. MacLaren's case, her purpose was not to conceal, but rather convenience. She was aware, however, that when she placed the object in her purse for that purpose, it was concealed from view.

[39] What if we were to remove this distinction? Suppose, for example, that Mr. Felawka did not intend to hide the rifle from his fellow passengers. Suppose, instead, that he wrapped it in his jacket because, while he was walking with it to the train station, it had started to rain, and he wished to keep it dry. Suppose further that he carried the weapon, thus wrapped, aboard the train.

[40] In such a case, virtually all of the social policy considerations and other concerns noted by Justice Cory in paragraph 30 of the decision (supra)would still exist. The accused still knew the rifle to be a weapon, and he knew that by carrying it wrapped in his jacket, the effect was to conceal it, even if that was not his purpose, in this altered fact scenario. One cannot doubt that the result would have been the same, given the reasoning of the majority.

[41] Some courts have commented on the potential of the majority decision in *Felawka* to lead to unfortunate results. To reference one such example, in *R v Surette* (2009) YKTC 92 it was pointed out (paragraph 30):

> "I believe that there is some merit to the dissenting opinion expressed by Lamer, C J C, in *Felawka* that an overly strict application of the majority reasoning with respect to categorizing items as weapons, irrespective of the circumstances of their concealment could lead to an unjust result. That is not to say that I disagree with the reasoning of the majority."

[42] Dalton, JPC, also considered some of these criticisms of *Felawka* in *R v C* (D.A.), 2007 ABPC 171. As she concluded at paragraphs 73-74 of her decision:

> The carrying of a concealed weapon is not the most serious or morally blameworthy offence in the Criminal Code. But that does not mean that it ought not to be a sanctionable offence. Parliament has recognized the public danger in the carrying of concealed weapons – even with a minimally blameworthy state of mind – and has chosen to create an offence to avert that public danger. Parliament's purpose is legitimate. All too often, garden variety, testosterone-fueled altercations that should end with nothing more than bruised bodies and egos turn deadly because of easy access by one of the combatants to a knife tucked into the inside pocket of a jacket. The purpose of the legislation is to avoid these senseless tragedies by circumscribing actions before the heat of the moment engulfs better judgment. Further, as was alluded to in R. v. Felawka, community malaise – and consequent danger – is intensified in a paranoid society where one must always be concerned about whether the person with whom one is sharing a seat on the bus is packing a deadly object. It is the purview of Parliament to enact legislation; it is the role of the courts to give effect to that legislation.
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> (Emphasis added)

[43] The bottom line appears to be that society has an interest in seeing to it that people who knowingly carry weapons should do so visibly. One reason for this is to provide clear warning, to anyone choosing to engage such individuals, of the type of risk being incurred in so doing. This interest would be undermined if persons choosing to carry hidden weapons were able to excuse themselves on the basis that the concealment,

although a known consequence, was merely incidental to the real purpose (in this case: convenience) of the accused's act (in this case, placing the baton in her purse).

[44] Having chosen to carry what she knew to be a weapon, Ms. MacLaren was not without options. For example, she could have obtained a holster to be worn at the belt (per Officer Degroot's testimony), which would have made carriage of the baton both visible and convenient. Instead, she chose to carry it in her purse . The clear result of her action was to conceal it from view. One is generally taken to have also intended the plain and obvious consequences of one's actions, even if one such consequence (concealment), on its own, was not the motive or purpose of the act in the first place.

[45] I do not consider the accused's degree of "moral turpitude" to be great, in this particular case. Nonetheless, I conclude that she is guilty of the offence as charged pursuant to Section 90 of the Criminal Code.

IV. With respect to the Section 88 charge, if the ASP baton is a weapon within the meaning of Section 88 and 90 of the Criminal Code, did the accused possess it "for a purpose dangerous to the public peace".

[46] Section 88 of the Criminal Code reads:

> 88(1) Every person commits an offence who carries or possesses a weapon, an imitation of a weapon, a prohibited device or any ammunition or prohibited ammunition for a purpose dangerous to the public peace or for the purpose of committing an offence.

[47] I will not repeat the analysis noted in conjunction with the Section 90 charge. Suffice it to say that the baton found to be in the Accused's possession is a weapon within the meaning of Section 88 as well. The issue with respect to this charge is whether carriage or possession of the baton (weapon) for self defence constitutes "a purpose dangerous to the public peace or for the purpose of committing an offence". I am satisfied that it does not.

[48] There are many different perspectives which may be brought to bear on this issue, some legal, some philosophical , and some that are mixtures of the two.

[49] I am unable to succinctly capture these varied points of view better than Seaton, JA, did in *R v Sulland* (1982), 2 C.C.C (3d) 68 (B.C.C.A) where, beginning at page 71, he noted:

> In my view, one does not commit the offence with which we are concerned if one carries a weapon for self defence that is an appropriate instrument with which to repel, in a lawful manner, the type of attack reasonably apprehended and if the person carrying it is competent to handle the weapon and is likely to use it responsibly. In the absence of other circumstances, such as conduct calculated to provoke an attack, the purpose is unlikely to be dangerous to the public peace. That an attacker might be repelled forcefully, and even injured, is not a danger that the section refers to. In that case the attack, not the response to it, breaches the public peace.

> It might be unwise to defend yourself or even prepare to defend yourself if the presence might result in greater injury. In the secure surrounding of the courthouse, we might think it better that people be beaten or raped then that they, or their assailant, be injured with a weapon. But those who must walk unsafe streets and who are not robust might feel quite differently. They might not be prepared to accept a beating. Some might chose to defend themselves. And they might carry something with which to defend themselves. A woman might have a hat pin and no hat. Is she, without more, guilty of this crime? Surely not. This is a very serious crime that warrants imprisonment for up to 10 years.
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> The code does not prohibit instruments for self defence in s. 85 (now s. 88) should not be converted into such a prohibition.

[50] Ms. MacLaren carried the baton for self protection. There was no evidence upon which one could dispute her stated purpose. Such was consistent with all of the surrounding circumstances, including the fact that she appears to have had legitimate concern about the unwanted attention of a violent ex spouse. While there are conflicting perspectives as to the wisdom of carrying weapons for self defence, this is not nearly sufficient to raise such conduct per se to the level where it should be punished by the imposition of criminal sanctions under this section.

[51] Accordingly, Ms. MacLaren is not guilty of the charge under to Section 88 of the Criminal Code.