

**PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** *R. v. McWhirter*, 2023 NSPC 2

**Date:** 20230217

**Docket:** 8625656, 8565657

**Registry:** Bridgewater

**Between:**

His Majesty the King

v.

Jason Michael McWhirter

<b>Judge:</b>	The Honourable Judge Paul Scovil
<b>Heard:</b>	January 6, 2023, in Bridgewater, Nova Scotia
<b>Decision</b>	February 17, 2023
<b>Charge:</b>	Section 177 Criminal Code Section 88 Criminal Code
<b>Counsel:</b>	Jason Michael McWhirter, for the Accused Richard Hartlen, for the Crown

**By the Court:**

[1] Peach Lane is a dead-end rural road connected to the Old Port Mouton Road near Liverpool, Queens County, Nova Scotia. There is only one home located on Peach Lane, and on September 5, 2022, Brian Grant was residing in a small travel trailer parked next to the home. It was an isolated area.

[2] A little after 10:00 pm, Mr. Grant saw an individual run by the trailer in the back yard area of the home. The person was dressed entirely in black and did not belong there. Mr. Grant then advised the homeowner and called 911.

[3] A short time later Police arrived and located Mr. Jason McWhirter, dressed entirely in black, huddled underneath the back deck of the home. Mr. McWhirter was arrested for trespassing at night and a cursory search found a knife in a leather sheath attached to his belt, and a folding knife in Mr. McWhirter's jacket pocket. Mr. McWhirter was taken to the local Royal Canadian Mounted Police detachment and charged with Section 177 of the **Criminal Code** for trespassing at night, as well as possession of a weapon for a dangerous purpose under section 88 of the **Criminal Code**.

**FACTS**

[4] The Crown called two witnesses, Brian Grant, and Royal Canadian Mounted Police Constable Devin Pulsifer.

**BRIAN GRANT**

[5] Mr. Grant had a history with the accused, Mr. McWhirter. Mr. Grant had developed a relationship through Facebook with Mr. McWhirter's roommate and ex-girlfriend, Cheryl Bristol.

[6] The relationship between Mr. Grant and Ms. Bristol broke down in what Mr. Grant described as a "rough break up." Mr. Grant spoke about his relationship with Mr. McWhirter as being difficult at first, but it had become amicable over time even after Mr. Grant ended the relationship with Ms. Bristol.

[7] Mr. Grant confirmed, in direct evidence, that on the day in question, or indeed at anytime, he had not invited Mr. McWhirter to his home on Peach Lane.

[8] On September 5, 2022, Mr. Grant reported seeing Ms. Bristol drive by his home on Peach Lane. He recognized Ms. Bristol's car. This had occurred about three hours prior to his seeing Mr. McWhirter on his property.

[9] Sometime after 10:00 pm Mr. Grant had gone outside his trailer to retrieve a flashlight. At that point he saw a male individual in dark clothing run by towards the back of the home. He then called 911 to report the fact someone was behind the house.

[10] The Royal Canadian Mounted Police arrived, and Mr. Grant saw the Royal Canadian Mounted Police with Mr. McWhirter at their police car.

[11] Mr. Grant confirmed no one had knocked at his door or made any other announcements of their presence. He also confirmed he had not extended an invitation to Mr. McWhirter to be on his property.

#### **CONSTABLE DEVIN PULSIFER**

[12] Constable Pulsifer was on General Duty patrol as a Royal Canadian Mounted Police officer on September 5, 2022. At 10:25 pm he responded to his dispatcher requesting him to go to Peach Lane to investigate because of Mr. Grants call.

[13] At 10:40 pm Constable Pulsifer arrived and met with Mr. Grant, and because of the conversation the officer began to search the property. During his investigation Constable Pulsifer heard heavy breathing coming from underneath the back deck of the house. He was able to see a person curled up under the deck.

[14] Constable Pulsifer called for the individual to come out, which he did. Mr. McWhirter was arrested and subjected to a pat down search.

[15] During the brief search two knives were found on Mr. McWhirter's person. One was a fixed blade hunting style knife in a sheath attached to Mr. McWhirter's belt. The second was a folding knife found in a jacket pocket.

[16] Mr. McWhirter was dressed in a black hat, black jacket, and black pants.

[17] After being arrested and searched Mr. McWhirter was placed in a police vehicle and then taken to the local Royal Canadian Mounted Police detachment for processing. Mr. McWhirter was charged with the offences before this court and released.

[18] Constable Pulsifer confirmed that Peach Lane was a small lane off Old Port Mouton Road that ended in a dead end. The house and trailer that Mr. Grant resided in was the only residence on the road.

## **DEFENCE EVIDENCE**

[19] Mr. McWhirter called two witnesses in his defence. These were Cheryl Bristol and himself.

## **CHERYL BRISTOL**

[20] Cheryl Bristol is Mr. McWhirter's long time roommate and past girlfriend. She testified as to her relationship with both Mr. McWhirter and Brian Grant.

[21] She had broken up with Mr. Grant but had communicated with him regularly. She was familiar with where Mr. Grant was living on Peach Lane but was also under a Court Order to have no contact with him.

[22] Ms. Bristol described how she was trying to contact Mr. Grant, both because she still had feelings for him, and she felt he could provide her with drugs.

[23] On the date in question Ms. Bristol convinced Mr. McWhirter to smooth things over with Mr. Grant and to obtain drugs. She drove Mr. McWhirter to Mr. Grant's house. She described Mr. McWhirter as highly intoxicated. Ms. Bristol dropped Mr. McWhirter off and then drove to the nearby area of Milton and hid her vehicle behind a fire hall.

[24] Ms. Bristol then later learned that Mr. McWhirter was in police custody at the Liverpool Royal Canadian Mounted Police detachment. Ms. Bristol attended at that location and picked Mr. McWhirter up.

[25] Mr. McWhirter testified on his own behalf. He stated on September 5, 2022, he was in his apartment in Bridgewater, Nova Scotia. Cheryl Bristol approached him to call Mr. Grant, however according to Mr. McWhirter, Mr. Grant's telephone number appeared to be non-operational.

[26] Ms. Bristol wanted Mr. McWhirter to persuade Mr. Grant to see her. Mr. McWhirter knew that Ms. Bristol was not allowed to contact Mr. Grant, nor could she attend his residence. Mr. McWhirter stated that Ms. Bristol knew he could be persuasive when he talked to people.

[27] Ms. Bristol drove Mr. McWhirter to the location.

[28] As indicated above there was only one residence on Peach Lane. Despite that, Mr. McWhirter stated he did not know if he was at the right property. Mr. McWhirter stated he heard people yelling and that he hid behind a tree. When police arrived Mr. McWhirter stated that he thought; "I'd lay low till the cops leave."

## LAW

[29] Here, like all cases before courts, proof of guilt must be found to be beyond any reasonable doubt before conviction can take place.

[30] Section 11(d) of the **Canadian Charter of Rights and Freedoms** provides that a person charged with an offence has the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal". The accused is presumed innocent of the charges unless the Crown proves each element of the offence beyond a reasonable doubt.

[31] Justice Cory speaking for the majority in **R. v. Lifchus**, [1997] 3 S.C.R. 320, summarized the principles of reasonable doubt as follows:

36. Perhaps a brief summary of what the definition should and should not contain may be helpful. It should be explained that:

- the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;
- the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;
- a reasonable doubt is not a doubt based upon sympathy or prejudice.
- rather, it is based upon reason and common sense.
- it is logically connected to the evidence or absence of evidence;
- it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and
- more is required than proof that the accused is probably guilty -- a jury

which concludes only that the accused is probably guilty must acquit.

[32] Justice Iacobucci, of the Supreme Court of Canada for the majority, said in **R. v. Starr**, 2000 SCC 40 that “an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities”. Mere probability of guilt is never enough in a criminal matter. The Crown must prove the guilt of an accused person beyond a reasonable doubt – which lies somewhere between probability and absolute certainty, but closer to absolute certainty.

[33] In this matter, given that the accused has testified, I must also apply the principles of **R. v. W.D.**, [1991] 1 S.C.R. If having heard all the evidence, I believe the accused, then I must acquit him. If I do not know whether to believe the accused and his testimony raises a reasonable doubt, I must acquit. If any of the evidence called by the accused raises a reasonable doubt on any of the elements of the offence, I must acquit. Even if I reject his evidence, before I can convict, I must ensure myself that on each and every element of the offence, there is proof beyond a reasonable doubt.

[34] Credibility plays a crucial role in the matter before this court.

[35] While a trial judge must give reasons for how they resolved credibility issues the Supreme Court of Canada has recognized that it is difficult, “to articulate with precision the complex intermingling of the impressions that emerge after watching and listening to witnesses.” It is not a “purely intellectual” exercise. See **R. v. R.E.M.**, [2008] 3 S.C.R. 3.

[36] Judges are entitled to accept all, some, or none of a witness’s evidence.

[37] Trial judges must scrutinize and examine all the evidence when considering the credibility of any single witness. In **R. v. D.D.S.**, [2006] NSJ No. 103 (NSCA), Justice Saunders of our Court of Appeal stated as follows:

77. Before leaving the subject and for the sake of future guidance it would be wise to consider what has been said about the trier's place and responsibility in the search for truth. Centuries of case law remind us that there is no formula with which to uncover deceit or rank credibility. There is no crucible for truth, as if pieces of evidence, a dash of procedure, and a measure of principle mixed together by seasoned judicial stirring will yield proof of veracity. Human nature, common sense and life's experience are indispensable when assessing creditworthiness, but they cannot be the only

guide posts. Demeanour too can be a factor taken into account by the trier of fact when testing the evidence but standing alone it is hardly determinative. Experience tells us that one of the best tools to determine credibility and reliability is the painstaking, careful and repeated testing of the evidence to see how it stacks up. How does the witness's account stand in harmony with the other evidence pertaining to it, while applying the appropriate standard of proof in a civil or a criminal case?

[38] Credibility cannot be determined by following some prescribed set of rules. Having said that, trial judges can and have assessed credibility by using a number of guideposts. While not exhaustive, Justice Mossip in **R. v. Fillion**, [2003] O.J. No. 3419 (Ont. SCJ) set out a series of factors which are instructive. He stated:

In assessing the reliability and credibility of witnesses testimony, I have considered factors that judges invite juries to consider such as:

- Does the witness seem honest? Is there any particular reason why the witness should not be telling the truth or that his/her evidence would not be reliable?
- Does the witness have an interest in the outcome of the case, or any reason to give evidence that is more favourable to one side than to the other?
- Does the witness seem to have a good memory? Does any inability or difficulty that the witness has and remembering events seem genuine, or does it seem made up as an excuse to avoid answering questions?
- Does the witness's testimony seem reasonable and consistent as she/he gives it? Is it similar to or different from what other witnesses say about the same event? Did the witness say or do something different on an earlier occasion.
- Do any inconsistencies in the witness's evidence make the main point of the testimony more or less believable and reliable? Is the inconsistency about something important, or minor detail? Does it seem like an honest mistake? Is it a deliberate lie? Is the inconsistency because the witness said something different, or because she/he failed to mention something? Is there any explanation for it? Does it make sense?
- The manner in which a witness testifies may be a factor, and it may not, on other variables with respect to a particular witness.

## **TRESSPASS AT NIGHT**

[39] Section 177 of the **Criminal Code** states:

177 Every person who, without lawful excuse, loiters or prowls at night on the property of another person near a dwelling-house situated on that property is guilty of an offence punishable on summary conviction.

[40] This section was considered by the Ontario Court of Appeal in **R. v. Priestap** [2006] O.J. No. 1511. Justice Lang at paragraphs 26 to 29 stated:

26. In enacting this section, Parliament specified that loitering or prowling would only be a criminal offence if committed at night near a dwelling house. It follows from this that, on a purposive interpretation of s. 177, Parliament did not intend to criminalize petty trespass, such as individuals entering on private property in the daytime in a manner that did not convey any malevolent purpose. Parliament, however, did intend to protect a resident by criminalizing the invasion of that person's residential property at night in a surreptitious manner when the intruder has no lawful excuse to explain his presence.

27. This makes sense. Instinctively, an occupant or other observer seeing a trespasser moving stealthily or furtively near a home at night, absent other explanation, would conclude that the trespasser's conduct evidences an intention to avoid detection - perhaps because the trespasser has committed, or is going to commit, or is contemplating committing, a reprehensible act. Whatever the prowler's motive, however, it is the act of prowling itself that is an unwarranted invasion that causes anxiety to the observer, and not any reprehensible act that the trespasser may intend to commit, may have committed, or is contemplating committing.

28. The prowler's purpose in prowling is not the focus of s. 177 because other provisions of the Code will likely address that purpose<sup>[\[1\]](#)</sup><sup>[\[1\]](#)</sup>. Moreover, inherent in prowling is the implication that the accused is up to no good. The accused is prosecuted under s. 177 only for prowling, and not for the underlying purpose of such activity.

29. It is because the offence is prowling and not the contemplation of another specific crime, that Parliament explicitly placed the burden on the prowler to provide a lawful excuse for his or her conduct.

[41] Here Mr. McWhirter was observed running through the property in the dead of night hiding from individuals. Mr. McWhirter was found evading police by hiding under a deck.

[42] Mr. McWhirter's stated purpose was to further contact with Mr. Grant by Ms. Bristol, who was under legal compulsion to have no contact with Mr. Grant.

[43] The actions of Mr. McWhirter clearly made out the offence of s. 177 of the **Criminal Code** and I convict him of that charge.

### **POSSESSION OF A WEAPON DANGEROUS TO THE PUBLIC PEACE**

[44] The Supreme Court of Canada considered the elements of s. 88 of the **Criminal Code** in **R. v. Kerr**, [2004] S.C.J. No. 39.

[45] Justice Bastarache for the majority stated the following:

25 There is some confusion in the jurisprudence about the proper test to be applied in the determination of purpose. In my view, the correct approach — a hybrid subjective-objective test — was adopted by the Ontario Court of Appeal in *Nelson, supra*. By this approach, the trier of fact must first determine what was the accused person's purpose; this is a subjective determination. The trier of fact must then determine whether that purpose was in all the circumstances dangerous to the public peace; this is an objective determination.

26. Section 88 requires simply that the accused person have a purpose dangerous to the public peace. Thus, any purpose will do, so long as that purpose is in consequence dangerous to the public peace. As discussed by this Court in *R. v. Hibbert*, 1995 CanLII 110 (SCC), [1995] 2 S.C.R. 973, the term "purpose" is capable of two different meanings: purpose as "intention" or purpose as "desire". In that case, the court concluded that, for the purposes of s. 21(1)(b) of the *Code*, the former definition should be adopted: "a person who consciously performs an act knowing the consequences that will (with some degree of certainty) flow from it 'intends' these consequences or causes them 'on purpose', regardless of whether he or she desired them" (para. 29).

27. I would endorse this same definition for the provision at issue. Thus, the question under the first stage of the purpose analysis is what object (or objects) did the accused person know would probably flow from his possession, whether he desired it (or them) or not. Of course, understood in this way, a person may have more than one purpose.

Since the provision reads “a purpose,” the Crown is entitled to rely on any of the accused person’s purposes.

[46] He went on to say:

29 Certainly, the determination of an accused person’s subjective purpose may involve consideration of objective indicia: *R. v. Hundal*, 1993 CanLII 120 (SCC), [1993] 1 S.C.R. 867; *R. v. Théroux*, 1993 CanLII 134 (SCC), [1993] 2 S.C.R. 5. The distinction between a subjective substantive standard and an objective approach to proof is well settled. As stated in *Nelson*, *supra*, at p. 31:

The subjective purpose of the accused, as testified to by him, is a factor, but only one of the factors, which must be considered by the trial Judge in deciding [what] was the “purpose of the possession.”

A final conclusion as to what that purpose was is to be arrived at after considering all of the relevant circumstances of the case, including the nature of the weapon, the circumstances under which the accused had it in his possession, his own explanation for that possession, and the use to which he actually put it, if that sheds light on what his purpose was in originally having it. [Emphasis in original.]

Thus, the testimony of the accused is not the only factor to be considered in determining his purpose; inferences as to purpose can be drawn from objective factors, such as actual use: see also *R. v. Proverbs* (1983), 1983 CanLII 3547 (ON CA), 9 C.C.C. (3d) 249 (Ont. C.A.).

(See also *R v. Phinney* [2012] N.S.J. No. 416 (NS Provincial Court))

[47] In this matter Mr. McWhirter in his testimony gave no evidence as to why he had the knives in his possession. Tangentially he stated that he was home and when Ms. Bristol got him to go with her to attend at Mr. Grant’s home he was not dressed and had to dress to go with her. He obviously would have armed himself at that time.

[48] Objectively, we have Mr. McWhirter attending at Mr. Grant’s house in the dark with all black clothing and armed with two knives. His purpose for attending was for Mr. Grant to have contact with Ms. Bristol despite there being some form of no contact provisions in place. Mr. McWhirter himself said he could be very persuasive. In addition, Mr. McWhirter was surreptitious in his movements about the property of Mr. Grant.

[49] Taking all the circumstances into account, Mr. McWhirter's possession of the knives that evening was dangerous to public peace.

[50] Accordingly, I convict him of both counts.

Paul Scovil, JPC