

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Turner*, 2024 NSPC 3

Date: 20240111

Docket: 8551148

Registry: Kentville

Between:

His Majesty the King

v.

Thomas Charles Turner

DECISION

Judge: The Honourable Judge Ronda van der Hoek

Heard: December 4, 2023, and January 4, 2024, in Kentville, Nova Scotia

Decision January 11, 2024, in Kentville, Nova Scotia

Charges: Section 266 of the *Criminal Code of Canada*

Counsel: Donald Urquhart, for the Provincial Crown
Thomas Turner, Self-Represented

By the Court:

Introduction

[1] Thomas Turner was standing outside the Berwick Feed and Needs Shur-gain, approximately ten or so feet away from his cellular phone. The phone was perched atop his boxed groceries sitting on a bench under the store awning. He turned back in the direction of his belongings and saw a woman reaching for his phone. Mr. Turner did not know the woman and quickly approached her from behind. He says he tapped her on the shoulder and shouted at her. The woman, Ms. van den Hof, says he grabbed her by the arms and pushed her. In any event, she was frightened by his action and called police.

[2] Mr. Turner was charged with assault contrary to section 266 of the *Criminal Code of Canada*. The Crown proceeded summarily.

[3] None of the essential elements of the offence are in dispute except the nature of the touching. Mr. Turner seeks to avail himself of the defence of property.

[4] This three-witness trial was rife with the usual issues and challenges arising when people are self represented. Additionally, in this case counsel had to be appointed to cross examine Ms. van den Hof, and there were disruptions and outbursts both from Mr. Turner and interested parties in the body of the Court. Delays arose for various reasons including the occasional absence of the defendant,

who also met with challenges understanding how to produce witnesses. So, a straightforward trial that commenced in July 2023 finally ended in January 2024.

[5] That said, none of the foregoing, including Mr. Turner's challenging behaviours, in any manner whatsoever influenced this Court's assessment of the case. I am ever mindful of our Court of Appeal's caution to trial judges about the perils of relying on out-of-box demeanour in assessing credibility. (See: *R. v. D.C.*, 2023 NSCA 20 and *R. v N.M.*, 2019 NSCA 4)

The testimony of Ms. van den Hof

[6] The Crown called one witness, Ms. van den Hof, who testified that she was at Berwick Gala Days with family and friends. When the parade wound down, she put her children in their car seats and stood smoking a cigarette under the awning of the Shur-gain building.

[7] Hearing a repeating beeping sound, Ms. van den Hof investigated believing it may be the building door alarm sounding. She walked away from her car to the building main door but found it secure. It was at that point she realized the sound was coming from a bench located to the left of the door. On the bench she saw a cell phone sitting on a stack of what she later realized was energy drinks. She reached for the phone.

[8] Ms. van den Hof testified that she did so with an intention to answer it on the assumption, “it belonged to another family or somebody, just anybody, to be able to say, ‘hey, whoever you’re calling, they’ve left their phone, this is where it’s at’”. She continued, “because it was post-pandemic”, she did not “want to actually pick it up and talk on it”, “so I literally just tried to answer it, but I didn’t even get the opportunity to do that.”

[9] She testified that nobody was around, “I didn’t see anybody, so when I tried to answer it, he had come up and he had grabbed from behind by both my arms”. She elaborated, “so I attempted to answer the phone, just by reaching out with my hand, my finger, to answer it, and at that point somebody came out of nowhere and forcefully assaulted me by throwing me several feet”. Finally, she also explained the action as follows: “He had grabbed me by both of my arms, and he threw me while yelling different profanities, ... like ‘What are you doing? Who are you? Why are you trying to steal my phone?’”.

[10] On cross-examination Ms. van den Hof explained that she also heard the person’s feet running toward her, adding, “to be honest, I didn’t see where exactly he came from. He just came out of nowhere, and he grabbed me from behind, so I didn’t see him until after he threw me”. Also on cross-examination, asked to surmise what Mr. Turner would have seen, she testified “he would’ve seen my finger

reaching out from the side”, but he was not in her vision when she walked toward the building door. She also denied Mr. Turner poked her shoulder, instead testifying, “there are hand marks on me where he grabbed me” and he was yelling.

[11] Ms. van den Hof says she told the man she was not trying to steal his phone, but he continued yelling at her. She called 911 and was “super upset” while on the phone. Mr. Turner tried to offer her an apology and an energy drink. She did not want to lose sight of him until the police came, so she told him to back up and stay away, and Mr. Turner did so, waiting quietly until the police arrived. On cross examination she agreed he sat on the bench and waited for the police. Asked to agree that cell phones are expensive, Ms. van den Hof testified she would protect hers within reason if someone tried to take it away. Instead, she was afraid when Mr. Turner forcefully grabbed her and threw her some distance. She added “the only reason” she did not fall was due a well-placed banister.

[12] The Crown asked Ms. van den Hof what injuries, repercussions, or consequences she suffered as a result of Mr. Turner grabbing her. She testified “my arms were sore, and **I did have handprints on both my shoulders**. Psychologically, it affected me big time for a long time “.

Assessing Ms. van den Hof's evidence

[13] Ms. van den Hof was an earnest witness. She was very upset about the brief and unexpected incident, which comes as no surprise. The details of her account expanded over the course of her testimony and the Court concludes that was due to nervousness and possibly outbursts from the gallery. There was, however, one concerning aspect of her testimony coming toward the end of an otherwise straightforward account that caused the Court concern. While testifying throughout that Mr. Turner grabbed her by her arms, her answer to the question about any resulting harm led to her to say her arms were sore, *and* she had hand marks on her shoulders. There was no explanation as to why she would have hand marks on her shoulders if she were grabbed by her arms. On cross examination she testified that she was left with marks on her arms. I should also note that while testifying Ms. van den Hof quickly pointed to areas on her body but there was no effort to have those areas described for the record that I can recall, and I do not recall her pointing to her shoulders.

[14] The nature of the touching is the single most important part of this case, Mr. Turner in his testimony maintained he tapped her on the shoulder, and she says he grabbed her by the arms. As a result, Ms. van den Hof's testimony about being left with hand marks on her shoulders, suggests an unreliable account. Adding to my concern, during cross-examination Ms. van den Hof testified photographs were

taken of the marks on her body, and the Crown followed up in redirect not appearing to have any information about photographs. Ms. van den Hof testified that the police took photographs of her injuries. No photographs were placed in evidence before the Court. I cannot speculate as to why that was the case or if any photographs existed. Clearly photographs would have been extremely helpful, if not determinative, given the very different perspectives with respect to the touching.

[15] Mr. Turner followed up on the photograph issue by calling an investigating officer. The officer testified that he was not aware photographs were taken of Ms. van den Hof, adding “perhaps a different officer took some”. This issue was left unresolved.

[16] Overall, the Court is concerned about the reliability of Ms. van den Hof’s testimony on the nature of the touching and is also concerned about her credibility with regard to photographs. So, aware that I can accept some, none, or all of a witness’s testimony, I do not accept Ms. van den Hof was grabbed such that hand marks were left on her shoulders or on her arms. Instead, I find she was completely startled by Mr. Turner’s fast approach and her evidence with respect to the nature of the touching is unreliable. It is possible she has come to believe that the touching occurred as described, not implausible in moments of sudden shock. She said she was psychologically impacted by the event “big time” and “for a long time”.

[17] Because Mr. Turner testified that he tapped her, and a tap is still an assault, I will now consider his testimony.

Mr. Turner's testimony

[18] Mr. Turner recalled the day, and says he went shopping in town only to find himself pushed by the parade in a direction away from his car. After catching a lift on the fire truck, he arrived at the Feed and Needs building where he placed his heavy boxed items on the bench - energy drinks and a box of cigarettes.

[19] He tried to call his girlfriend for a drive to the other side of town, but became frustrated when the cell phone, programmed to call only her and 911, for some reason started continuously beeping as it was stuck in emergency mode. Feeling frustrated, he set the phone down on top of his boxes of energy drinks and cigarettes and walked approximately ten feet or so away. On cross-examination he explained that he “figured I could trust I could do so without fear of anyone touching my property”. At some point he turned and saw “this girl” who he thought was trying to steal his belongings. He says quickly approached, touched her on the shoulder, and yelled.

[20] On cross-examination Mr. Turner denied grabbing the woman, testifying I “just tapped her on the shoulder”, and said “What the fuck are you doing!”

[21] Mr. Turner testified that Ms. van den Hof was “freaking out” after he touched her, and “others were swarming in”. He estimated five or six people swarmed in and

there was a lot of commotion while he was apologizing. He completely denies shoving Ms. van den Hof a distance and says if there was any bruising on her it was not caused by him. He also does not recall her stumbling as a result of his tap.

[22] He feels badly for all that happened, but believed he was stopping a thief. He also thought they had worked out the issue but does not recall offering her an energy drink.

[23] Mr. Turner explained to the Crown Attorney that he tapped her on the shoulder to prevent her reaching for his phone. He said there was nothing overly violent in his action, and he considered it reasonable to prevent her from taking his phone. He wishes to avail himself of the defence of property.

Position of the parties

[24] The Crown argues that there are two different versions of events, and the Court should accept that of Ms. van den Hof. He says Mr. Turner was an excitable character who was argumentative on the witness stand. He says I should disbelieve Mr. Turner's testimony that he rode the fire truck part of the way down the parade route to arrive at the store because it is implausible such a thing could happen. The Crown did concede a tap on the shoulder would represent *de minimis* touching, however does not accept that occurred. He also says the defence of property has no air of reality, and the Court should not consider it.

[25] Mr. Turner argues Ms. van den Hof was not an accurate and truthful witness, and her surprise led to her overreaction. His action was reasonable in regard to protection of property because he caught her red-handed. He did not touch her with two hands, instead he tapped her with one, and she got scared. He says he was a credible witness and the reason he is upset relates to being “triggered because of the false allegation”.

Defence of property

[26] While the Crown argued there was no air of reality to the defence of property. With respect, I disagree.

[27] The Supreme Court of Canada in *R. v. Cinous*, 2002 SCC 29 explained the air of reality test requires a judge to determine if there is an evidentiary foundation for the defence by asking two questions: (1) is there evidence, (2) upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true.

[28] The test requires consideration of all of the evidence, without regard to assessing the merits of the defence. A trial judge simply “considers the totality of the evidence, and assumes the evidence relied upon by the accused to be true” (*Cinous* at para [53](#)). Any doubt is resolved in favour of considering the defence.

[29] [Section 35](#) of the Code sets out the elements of the defence. For the purpose of this case, they are as follows:

1. That Mr. Turner was in peaceable possession of the property on the bench.
2. That he believed on reasonable grounds Ms. van den Hof was about to take the property without his permission.
3. His act constituting assault was undertaken for the purpose of preventing her from taking his property.
4. His action was reasonable in the circumstances.

[30] Based on his evidence, if accepted, there is an air of reality to the defence. It now turns to the Crown to disprove one or more of the elements of the defence.

Mr. Turner was in peaceable possession of his property located on the bench:

[31] Mr. Turner's evidence provides support for his peaceable possession of property. His phone was located ten feet from him, along with his groceries, it was broken and beeping. He did not abandon this property. It was not on the ground and was instead on the bench of a closed building and sheltered from the rain under the building awning. I find, Mr. Turner was nearby and in peaceable possession of his property despite walking away from it. The first element of the defence is established.

Mr. Turner believed on reasonable grounds Ms. van den Hof was about to take his property without his permission:

[32] In assessing the event that led Mr. Turner to touch Ms. van den Hof, the Court applies a subjective consideration to what he believed and an objective consideration asking would a reasonable person share his belief.

[33] Mr. Turner testified that he saw an unknown woman reaching for his cellphone. He immediately reacted and tapped her shoulder asking “what the fuck” she was doing. He believed he was thwarting a thief who was taking his property, and this subjective understanding makes sense in the circumstances. His property consisted of stacked items including cigarettes and the cellphone. He did not know Ms. van den Hof’s intention when she reached for the cell phone. Cell phones are expensive items often containing personal information, akin to a woman’s purse.

[34] The Court also finds it reasonable to conclude a stranger reaching toward the items was about to steal them. The nature of the items also informs my view - a box of cigarettes and a cell phone are valuable items that are, unfortunately, easily, and regularly stolen. Who does not imagine leaving such an item behind and fearing it will not be there when one returns. The second element of the defence is established.

Mr. Turner’s assaultive act was undertaken for the purpose of preventing Ms. van den Hof from taking his property:

[35] Mr. Turner’s defensive action must be subjectively assessed to determine if it was taken to stop Ms. van den Hof taking his property. He says he tapped her on the shoulder and yelled profanities. He did so to stop a theft, and for no other reason. There had been no previous contact between these two strangers. In the totality of the circumstances, I find touching was undertaken to prevent the commission of an

offence - to prevent Ms. van den Hof taking his property. The third element of the defence is made out.

His action was reasonable in the circumstances:

[36] Finally, the Court must consider whether the action taken by Mr. Turner was reasonable. This question is assessed on an objective basis to determine if the actions were reasonable in the circumstances.

[37] At this point I will assess his testimony, conscious that I must also apply the steps in *R. v. W.(D)*, [1991] 1 S.C.R. 742. If I accept his evidence that he tapped her that will support the defence of property. If do not accept his evidence but find it leaves me in a doubt, I can find the same. If on a consideration of all the evidence I find the touch was a tap, I can also accept the defence.

[38] This approach has been described as a “modified *W.(D.)* approach”, and is necessary since an essential element of the defence is objective. Even if I believe Mr. Turner’s account of what happened, or it raises a reasonable doubt, I may still reject that he acted in defence of his property on the grounds that his use of force was unreasonable in the circumstances (see *R. v. Mousseau*, 2023 MBKB 7 at para 77).

[39] After considering his testimony, I did not necessarily believe his account, but find I cannot reject it. He was an earnest witness, certainly frustrated and very upset

about the allegation. He was unshaken on cross examination. I did not find his account of getting a lift on a rural fire truck during a parade implausible, although it seemed to me a collateral issue in any event. I also found his testimony about tapping and yelling plausible in the circumstances. He was certainly within his right to tap and yell at a stranger who he believes was about to steal his cell phone.

[40] Based on the facts as I find them, Mr. Turner's use of force by tapping Ms. van den Hof was reasonable in the circumstances. I reach this conclusion because his items were lightweight and easily stolen. He was only ten feet away when she approached and reached for his phone. There were other people around the general area during the end of the parade and his fear that the stranger would steal the items was reasonable in those circumstances. His touch was accompanied by words indicating his concern. He did not touch her but the once. It all happened quickly, he apologized and awaited the arrival of police.

[41] Since I have no reason to reject his evidence, I find the Crown has not disproved an element of the defence of property. It applies. Given my finding as to the nature of the touch. The Crown has not proven the charge to the criminal standard of proof beyond a reasonable doubt.

[42] Judgment accordingly.

