IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Krzychowiec, 2004 NSPC 60

Date: 20040825
Docket: 1360629-33
Registry: Halifax

Between:

Her Majesty the Queen

v.

John Jan Krzychowiec

Judge: The Honourable Associate Chief Judge R. Brian Gibson, J.P.C.

Dates Heard: August 13, 2004
August 19, 2004

Date of Oral Decision: August 25, 2004

Date of Written Decision: November 15, 2004

Charges: That he, on or about the 1st day of October, 2003 at or near Dartmouth in the County of Halifax in the Province of Nova Scotia, did unlawfully utter a threat to Cst. David Piccott to cause bodily harm or death to the said Cst. David Piccott, contrary to Section 264.1(1)(a) of the **Criminal Code**.

AND FURTHER that he at the same time and place aforesaid, did unlawfully utter a threat to Cst. Susan Foster to cause bodily harm or death to the said Cst. Susan Foster, contrary to Section. 264.1(1)(a) of the **Criminal Code**.

AND FURTHER that he at the same time and place aforesaid, did unlawfully utter a threat to Cst. Tony Croft to cause bodily harm or death to the said Cst. Tony Croft, contrary to Section 264.1(1)(a) of the **Criminal Code**.

AND FURTHER that he at the same time and place aforesaid, did in committing an assault on Cst. David Piccott use or threaten to use a weapon, or imitation thereof, to wit., a shiny knife like object, contrary to Section 267(a) of the **Criminal Code**.

AND FURTHER that he at the same time and place aforesaid, did unlawfully assault Cst. Tony Croft, a Peace Officer, engaged in the execution of his duty, contrary to Section 270(1)(a) of the **Criminal Code**.

Counsel: G. Arthur Theuerkauf, for the Crown
David Grant, for the Defence

By the Court:

[1] The accused, John Jan Krzychowiec was charged with three counts of uttering a threat, contrary to Section 264.1(1)(a) of the **Criminal Code**, one count of assault while using or threatening to use a weapon, to wit: "a shiny knife like object", contrary to Section 267(a) of the Criminal Code and with the offence of assaulting a peace officer engaged in the execution of his duty, contrary to Section 270(1)(a) of the **Criminal Code**. The complainants with respect to these charges were all peace officers.

[2] The incidents which resulted in the aforementioned charges all occurred on October 1, 2003 within the premises located at 357 Portland Street, Dartmouth, Nova Scotia which is an apartment building where the accused resided on that date.

[3] On August 25, 2004, I found the accused not guilty of all charges before me. Because the accused had been remanded into custody with respect to these charges pending his trial, I gave an abbreviated oral decision and undertook to provide more detailed written findings and reasons at a later time. These are my detailed findings and reasons.

[4] The accused alleged that his Section 8 **Charter** rights were violated and sought exclusion of at least some, if not all, of the Crown's evidence

pertaining to the aforesaid charges pursuant to the provisions of Section 24(2) of the **Charter**.

[5] In order to determine the **Charter** issue it was necessary to consider whether: (1) the incidents giving rise to these charges occurred within the accused's dwelling house; (2) if the incidents in question occurred within the accused's dwelling house, were the police authorized to be there; (3) if the police were not authorized to be in the accused's dwelling house, were the accused's Section 8 **Charter** rights violated and, if so, what evidence, if any, ought to be excluded.

[6] I found that the accused's Section 8 **Charter** rights were violated by the police. However, I concluded that it was not appropriate to exclude any evidence pursuant to the provisions of Section 24(2) of the **Charter** as a result of the Section 8 **Charter** violation.

[7] Upon determining the **Charter** issues, it was necessary to consider whether the evidence was sufficient to prove the accused guilty beyond a reasonable doubt of any, or all, of these charges. Consideration of the evidence required consideration of Section 40 and 41 of the **Criminal Code**. I also considered Sections 34, 36 and 37 of the **Criminal Code**.

[8] The evidence concerning both the **Charter** breach allegation and the substantive trial issues was called within the context of the **Charter** *voir dire*. Counsel for both parties agreed that the evidence called during the **Charter** *voir dire* should also be adopted in respect of the substantive trial issues to the extent that the Court might find that there was admissible evidence not excluded after determining the outcome of the **Charter** breach allegation.

[9] Police contact with the accused on October 1, 2003 stemmed from a comment made by the accused four days earlier on September 27, 2003 while he was working as a painting contractor on a property adjacent to a property known as 43 Dundas Street, Dartmouth, Nova Scotia.

[10] The comment resulted in a complaint to the police on October 1, 2003. Investigation of that complaint on October 1, 2003 by three peace officers led those three peace officers to attend at 357 Portland Street for the purpose of speaking to the accused despite concluding from their investigation that the accused had not committed any offence on September 27, 2003.

[11] No evidence was adduced by the Crown with respect to what the police officers learned from their investigation, aside from the identity of the accused and his address. The accused testified that he had observed two

females dancing in the kitchen of the 43 Dundas Street property while he was standing on the adjacent property. According to his testimony, upon making this observation he told the two females that if they liked to dance, they could dance with him some day. The two females made the complaint which led to the police investigation.

[12] I will return to the evidence pertaining to the September 27th incident and the police investigation thereof below in conjunction with the police authorization issue.

Dwelling House

[13] Dwelling house is defined in Section 2 of the **Criminal Code** as follows:

> Dwelling house means the whole or any part of a building or structure that is kept or occupied as a permanent or temporary residence, and includes (a) a building within the curtilage of a dwelling-house that is connected to it by a doorway or by a covered and enclosed passageway, and (b) a unit that is designed to be mobile and to be used as a permanent or temporary residence and that is being used as such a residence;

[14] The accused resided in Apartment 11, a third floor two-bedroom apartment located within a multi-unit apartment building at 357 Portland Street in

Dartmouth. The apartment building where the accused resided was a secure building, secured by a locked inner front door located inside a front door lobby. The lobby was open to public access. Initial contact with tenants of the building by visitors or those wishing to have contact with tenants was through a buzzer/intercom system located in the front entrance lobby. Tenants were able to unlock the front door from inside their apartments and thereby permit entry into the building.

[15] The stairs and hallways within the building provided passageway from the front entrance to various apartments including the apartment occupied by the accused. Apartment 11, the hallways, stairways and other areas inside the apartment building at 357 Portland Street shared by the accused in common with other tenants and the owner, were part of the accused's dwelling house on October 1, 2003. The aforesaid described enclosed space within the building at 357 Portland Street fell within the definition of "curtilage" as found in the definition of "dwelling-house" set out in Section 2 of the **Criminal Code**. I found support for this conclusion in the decision of R. v. Adams (2001) 157 C.C.C. (3d) 220 (Ont.C.A.).

Police Authorization

[16] The three police officers, after investigating the 43 Dundas Street complaint on October 1, 2003, decided to speak to the accused as soon as possible even though their investigation of the September 27th incident disclosed that no offence had been committed by the accused. The police officers testified to having a concern that the accused may return to the area of 43 Dundas Street. Apparently it was a pressing concern, although no evidence was adduced to substantiate that level of concern. Despite their knowledge of an absence of electrical power to the 357 Portland Street building resulting from Hurricane Juan on September 29th, the police officers went to the 357 Portland Street property at approximately 9:40 p.m. Darkness had occurred. They had been at the 357 Portland Street property earlier that evening looking for the accused and had encountered the building superintendent who advised them that the accused was not at home. Prior to going to 357 Portland Street on that first occasion, the police had unsuccessfully tried to make telephone contact with the accused. They learned on their first visit that the 357 Portland Street property was a secure building with a locked front door. The police therefore learned that due to the absence of electrical power to the building, it would be impossible to use the lobby buzzer to

contact the accused at his apartment or speak to the accused through the intercom from the front door lobby.

[17] The police did not have an arrest warrant when they went to the 357 Portland Street address on either occasion that evening. By their own admission, they did not have grounds to seek the issuance of an arrest warrant. Nevertheless, the three police officers enlisted the assistance of the building superintendent to gain entry to the 357 Portland Street property so that they could knock on the accused's apartment door. On their first visit to 357 Portland Street they asked the superintendent to contact them when the accused arrived home. When the superintendent called the police later that evening to advise that the accused had arrived home, the three police officers immediately went to the 357 Portland Street property. They were met at the entrance by the superintendent who allowed the police officers to enter the building so they could proceed to the accused's apartment door. The superintendent followed them.

[18] The superintendent had not previously spoken to the accused that evening to gain his authorization to permit police access to his apartment door. No evidence was adduced to establish that the accused had, in any way, either verbally or in writing, previously granted a general authority to the

superintendent to permit individuals to enter the 357 Portland Street property for the purpose of knocking on his door. The police made no inquiries of the superintendent to determine whether he had sought and obtained authorization from the accused or otherwise had authority to permit the police to enter the building for the purpose of knocking on his door. No attempt was made to contact the accused by telephone at this time, prior to entering the building.

[19] The police do have a general duty to not only investigate crime but also to prevent crime. See R. v. Waterfield, [1963] 3 All E.R. 659 at p.661 as approved in R. v. Dedman (1985) 20 C.C.C. (3d) 97 (S.C.C.) at p.105. This duty is not only found in the common law but is also imposed by the **Police Act**, R.S.N.S. 1989, c.348 (as amended).

[20] I infer from the evidence that the desire of the police officers to speak to the accused on October 1st stemmed from their general duty to prevent crime. The police officers appeared to have a genuine concern about possible further contact between the accused and the two females at 43 Dundas Street. They clearly wanted to speak to the accused in person about the September 27th incident. Constable Piccott testified that he wanted to speak to the accused “man to man”.

[21] Police officers must keep in mind that in the absence of a legal duty found in a statute, there is no legal duty on the part of a citizen to speak to the police whether in person or otherwise. MacDougall, J.P.C. in the unreported decision of R. v. Rhyno dated April 9, 2003, quoted with approval Lord Parker in Rice v. Connolly [1966] 2 All E.R. 649 wherein he stated as follows at pp.651-2:

> "It seems to me quite clear that every citizen has a moral duty or, if you like, a social duty to assist the police, there is no legal duty to that effect, and indeed the whole basis of the common law is that of the right of the individual to refuse to answer questions put to him by persons in authority, and a refusal to accompany those in authority to any particular place, short, of course, of arrest."

[22] It is therefore important for police officers, who are simply acting under their general duty to prevent crime and desire, in furtherance thereof, to speak to an individual, to keep in mind that they have no right to prevail upon such individual, absent some statutory authority or judicial authorization. If police officers want to speak to someone within this aforesaid general duty of crime prevention, as was the case with the accused, they must remember and respect that it is a matter of a choice for that individual whether or not he speaks to them. In such situations, the police have no right to enter the dwelling of individuals for the purpose of speaking

to them in person without their consent or other authorization. The decision in R. v. Tricker (1995), 96 C.C.C. (3d) 198 (Ont. C.A.) had no applicability here. The implied license to any member of the public on legitimate business, including a peace officer, to enter the property ends at the door of the dwelling, which in this case, was the locked inner front door located in the front door lobby of the apartment building where the accused resided, not his apartment door.

[23] Landlords and their agents who act solely on a moral duty to assist the police by permitting police entry into a secure building to knock on a tenant's apartment door are facilitating a trespass upon the tenant's dwelling if they do not have or obtain the tenant's consent or authorization. In this case, the superintendent facilitated a trespass by the police upon the accused's dwelling when he permitted their entry into the building without the prior authorization or consent of the accused.

Section 8 Charter Violation

[24] When the police entered the secure common areas of the 357 Portland Street building, including the hallway immediately outside the accused's apartment, they were in the accused's dwelling. They had no authority to be

there. Their entry into that area without the accused's consent and without legal authorization constituted a violation of the accused's Section 8 **Charter** rights. I drew support for that conclusion from the decision in R. v. Feeney (1997) 7 C.R. (5th) 101 (S.C.C.). I will deal with the implications of this conclusion when dealing with the evidence pertaining to the **Criminal Code** charges.

Section 24(2) Charter Remedy

[25] The evidence which the accused sought to exclude pursuant to Section 24(2) of the **Charter** was that which arose from the interaction between the accused and the police. The Crown sought to have that evidence admitted in support of the charges herein. The evidence consisted of utterances and actions by the accused in response to the presence and actions of the police. The police did not discover evidence of any other alleged criminal activity while they were within the accused's dwelling house.

[26] If the police had not entered the accused's dwelling house without authorization, the subsequent incidents giving rise to these charges would not have occurred. I also considered that the mere presence of the police in the accused's hallway, being part of his dwelling house, without

authorization, was provocative. However, despite the fact that the police were within the accused's dwelling house without authorization, the accused was not conscripted to provide incriminating evidence.

[27] While the police presence and their actions did provoke a response from the accused, the response was of the accused's choosing. The issue in this trial was whether the response was a justifiable response or whether the response constituted an offence.

[28] Although the breach of the accused's Section 8 **Charter** rights was serious, admission of all the evidence related to the interaction between the accused and the police would not render the trial unfair. Conversely, to exclude that evidence would likely render the trial unfair. The purpose of Section 24(2) of the **Charter** is not intended to remedy police misconduct. (See Collins v. R. (1987), 56 C.R. (3d) 193; Jacoy v. R. (1988) 66 C.R. (3d) 336; and R. v. Geneste (1989) 67 C.R. (3d) 224).

Defence of Property

[29] As stated above, these charges against the accused stemmed from the reaction of the accused to the unauthorized presence and actions of the three police officers within his dwelling house. Sections 40 and 41 of the

Criminal Code were invoked by the accused in his defence to these charges. Sections 40 and 41 of the **Criminal Code** state:

> 40 - "Every one who is in peaceable possession of a dwelling-house, and every one lawfully assisting him or acting under his authority, is justified in using as much force as is necessary to prevent any person from forcibly breaking into or forcibly entering the dwelling-house without lawful authority."
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> 41(1) - "Every one who is in peaceable possession of a dwelling-house or real property, and every one lawfully assisting him or acting under his authority, is justified in using force to prevent any person from trespassing on the dwelling-house or real property, or to remove a trespasser therefore, if he uses no more force than is necessary."
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> 41(2) - "A trespasser who resists an attempt by a person who is in peaceable possession of a dwelling-house or real property, or a person lawfully assisting him or acting under his authority to prevent his entry or to remove him, shall be deemed to commit an assault without justification or provocation."

[30] I concluded that the accused had reasonable grounds to believe that the police were trespassers. See R. v. Keating (1992) 76 C.C.C. (3d). I also found that the police, as trespassers, had a reasonable opportunity to withdraw after it ought to have become apparent to them that they were trespassers. They did not withdraw. I concluded that the threatened use of force and actual force used was no more than was reasonable under the circumstances and no more than what the accused, on reasonable grounds,

believed was necessary to either remove the police or cause them to quit their trespass.

[31] In the course of assessing the evidence given by Crown witnesses and that given by the accused, I relied upon the direction in R. v. W.D. (1991) 63 C.C.C. (3d) 397 (S.C.C.) with respect to the issue of credibility as it relates to the rule of proof beyond a reasonable doubt as set out at page 409 in that decision.

[32] The accused, when he responded to the initial knock on his door by the police, made it clear that he did not wish to speak to them and wanted them to leave. When the accused opened the door, Constable Piccott informed the accused about the complaint they had received and that they wanted to speak to him about it. The accused advised the police that he had done nothing wrong and that he did not want to speak to them about the matter and that they should speak to his lawyer. The accused then closed his door.

[33] The superintendent, who was approximately 15 to 20 feet away and standing in the hallway, had the impression that the accused wanted the police to leave. The three police officers must have had the same impression. Any belief the police officers had that the accused may have authorized the superintendent to permit their entry into his dwelling house ought then to

have been revealed as a mistaken belief. They ought to have realized that they had no authority to remain in the accused's hallway. They were trespassers and they should immediately have left the building.

[34] Constable Piccott testified that he thought the accused seemed agitated during this initial interaction with him. All three police officers testified that the accused, during this initial face-to-face contact, stated that if they came near him he would shoot them. This evidence is inconsistent with the testimony of the accused and that of the superintendent, Trevor Vaughn. I did not believe the accused to be as calm as his testimony suggested, however I was not satisfied, during his initial contact with the three police officers, that he threatened to shoot them. It was at a later point, well after he had closed his apartment door, followed by the persistence of the police at his apartment door, that the accused stated that he would shoot them if they did not leave. The accused did not have a gun on his person or in his apartment.

[35] The evidence of the police officers that the accused threatened to shoot them during this initial contact was not credible. It was not only inconsistent with the testimony of the accused and that of the superintendent, Trevor Vaughn, but also inconsistent with the context of the brief verbal exchange that

occurred between the police officers and the accused when he responded to their initial knock on his apartment door. I believed the accused when testified that he opened his apartment door, listened initially to what the police had to say by way of explanation for their presence, informed them that he didn't want to speak to them and advised them to speak to his lawyer. The police evidence was corroborative of the accused's testimony at least to that extent. I further believed the evidence of the accused that he thereafter closed his apartment door without giving the police officers any further opportunity to speak to him. There would have been no reason for the accused to threaten to shoot the police after this brief verbal exchange. He expected that the police would leave, believing he had made it clear that they should do so.

[36] I concluded that the police officers were mistaken in their recollection about the timing of such threatening words, just as the police were similarly mistaken in their evidence about the hallway being well lit with artificial lighting. The only artificial lighting in the hallway was from their flashlights. The police were also mistaken about how long or vigorously they continued to knock on the accused's apartment door after their initial contact with him.

[37] I was left with the impression by the manner in which they described the lighting and the extent of their knocking that the police were attempting to minimize the provocative nature of their conduct.

[38] It may be that the recollections of the police officers were influenced by their reflection upon the unfortunate events which followed their initial contact with the accused or by the complaint which the accused subsequently made against one of the officers alleging the use of excessive force. The events which unfolded on October 1, 2003 should not have occurred and would not have occurred if the three police officers had left the accused's dwelling house after their initial contact with him. I inferred from their testimony that they had an understanding of that reality. Ultimately, the manner in which the three police officers testified left me with the impression that their evidence was given in a somewhat self-serving fashion.

[39] Subsequent to the accused closing his apartment door, the three police officers continued to knock on his apartment door. According to their evidence, the accused, within a couple minutes after initially closing the door, suddenly opened the door and lunged into the hallway holding a small shiny metal flashlight in his right hand. The police described the flashlight as a shiny metal object which one of the officers initially thought was a knife

until it fell onto the hallway floor. According to the police there was no physical contact at this point between any of them and the accused. Trevor Vaughn, however, testified that one officer grabbed the accused's arm. Nevertheless, the accused quickly retreated back into his apartment. He was unable to close the door fully because Constable Piccott was able to insert his flashlight between the door and the door frame. To prevent the police from opening the door, the accused wedged a carpet under the door. The police began to push and knock more vigorously on the accused's apartment door, however they could not open it. The three police officers decided to call for backup.

[40] With the addition of police backup, greater force was placed upon the apartment door causing the door to break away from its hinges. The police rushed into the apartment and arrested the accused.

[41] Prior to arresting the accused, Constable Croft found the accused in the kitchen area in what he described as an aggressive stance. That evidence was the basis for the Section 270(1)(a) charge. Constable Croft testified that he gave the accused two or three hard punches to his face before arresting him. The accused suffered some bruising on his face. It was this action by Constable Croft that led the accused to make a complaint about the use of

excessive force. Constable Croft was subsequently cleared with respect to that complaint.

[42] The accused testified that the police continued to knock on his apartment door for approximately 30 minutes after he had first opened and closed his door in response to their initial knock. Trevor Vaughn testified that the police continued to knock on the accused's door for approximately 15 to 20 minutes. I preferred the evidence of the accused and Trevor Vaughn with respect to the length of time that the police continued to knock on the accused's door and found that the police continued to knock for at least 15 further minutes before the accused opened the door and lunged into the hallway holding the small flashlight. The knocking by the police on the accused's apartment door and verbal communication between the accused and the police continued until police backup arrived.

[43] During the aforesaid time that the police continued to knock on the accused's door, the accused became agitated and was yelling and swearing at the police. On the evidence I find that it was during this time that the accused threatened to shoot the police officers if they did not leave. It was a threat which the police apparently did not take seriously as they continued to knock on the accused's door and remain in the position where clearly they

would have been exposed to harm if the accused actually had a gun in his possession and decided to use it. However, despite the fact that the threat was an empty threat which the police did not, apparently, take seriously, it is clear that the accused intended them to take it seriously and withdraw.

[44] A threat to shoot someone clearly is a threat to use force. I would infer that the threat to use force, as expressed by the accused, is less serious than an actual use of force. Sections 40 and 41 contemplate the actual use of force to prevent a trespass or the breaking into one's dwelling. I found that Sections 40 and 41 contemplate a threatened use of force and under the circumstances of this case, I found that the threatened use of force was justified in this case. The accused testified that when the police failed to leave after he initially responded to the knock on his door, he called 911 without any success. The accused justifiably saw the police presence on this evening as threatening. They were trespassers who refused to withdraw. Therefore, notwithstanding the threatened use by the accused of extreme force, it was justified on this occasion. It was relevant, in the course of considering this issue, that the accused did not have a firearm.

[45] The lunge into the hallway by the accused while holding the flashlight might fall within the definition of assault as set out in Section 265 of the **Criminal**

Code. That was the Crown's position. No force was actually applied to any officer, however the accused came closer to Constable Piccott than any other peace officer when he lunged into the hallway. The lunge into the hallway while holding the flashlight was the basis of the S.267(a) charge. Once again, under the circumstances, I would find that this force or threatened use of force, if it constituted an assault with a weapon, was justified under the provisions of Sections 40 and 41. It was a clumsy, but nevertheless justified physical gesture to have the police withdraw and quit their trespass.

[46] The testimony of Constable Croft that the accused assumed an aggressive stance might also fall within the definition of assault as found in Section 265. However, in light of the fact that the police had unjustifiably broken down his door and entered into his apartment, such a stance would be justified not only under the provisions of Sections 40 and 41 but also likely under the provisions of Sections 34, 36 and 37 of the **Criminal Code**. The accused did not actually apply force to Constable Croft.

[47] In this case the police officers either ignored or lost sight of the fact that they were trespassers. By their failure to leave the accused's dwelling house when they ought to have left, they provoked what they should have foreseen would be an escalated response from the accused. I was not persuaded that

the accused's response exceeded that which was justified under the circumstances and therefore I found him not guilty of all charges.

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R. Brian Gibson
Associate Chief Judge