SUPREME COURT OF NOVA SCOTIA
Citation: *R v. Pictou*, 2019 NSSC 405

Date: 20191210
Docket: *Yarmouth*, No. 490087
Registry: Yarmouth

Between:

Her Majesty the Queen

Plaintiff

v.

Michael Keith Pictou

Accused

Judge: The Honourable Justice Pierre L. Muise

Heard: December 10, 2019, in Yarmouth, Nova Scotia

Counsel: McFarlane Njoh, for the Plaintiff

Michael Power, Q.C.,for the Accused

Decision Rendered Orally December 10, 2019

INTRODUCTION

[1] Mr. Pictou and the complainant, Sherry Goodwin, had been in an amorous relationship for about a year and a half and had lived together for a while. In October 2018, they were still in a relationship; but, Mr. Pictou was living at his mother's residence.

[2] That thanksgiving Monday, October 8, Ms. Goodwin went to visit him there. They spent the evening together watching movies in his bedroom, with no negative interactions, according to Ms. Goodwin. Around 11 pm, Ms. Goodwin indicated she had to go to her home in the Barrington area, as her daughter was there, and she had to go take care of her daughter. At that point Mr. Pictou asked to go for coffee.

[3] Ms. Goodwin agreed and drove them to a local Tim Horton's. On the way there he picked up a pink bear spray mace unit that she kept in the centre console and was fidgeting with it. She went thru the drive through, paid for their coffees with cash, and headed back towards the residence of Mr. Pictou's parents. On the way there, Mr. Pictou made a comment about what he thought he wanted to do with the bear spray.

[4] She testified he said he had had always thought he would fuck her up (which she took as mess her up) with it and asked what she would give him not to do it. He testified he said “this stuff could fuck you up” and was not implying “fuck her up”, he meant anyone. His evidence on whether or not he asked her what she would give him not to do it will be discussed later.

[5] He knew or expected she would have crack cocaine in her purse, as she was selling it. He said he was addicted to crack cocaine at the time.

[6] She testified that just after they passed the police station she felt “a sharp object” up to her throat and he told her to keep driving, but, she refused. She turned into the road where Mr. Pictou’s parents lived. She said she was honking her horn the whole way down.

[7] When she turned into the driveway, they had a scuffle over her purse, each of them having grabbed it. Mr. Pictou, by his own admission, bit Ms. Goodwin on the right shoulder, pulled the purse from her and ran away with it. During this time, he had kept holding the bear spray and had left with it.

[8] Ms. Goodwin called the police. They brought in the tracking dog and handler. However, they were unable to locate Mr. Pictou that night. The next night,

following a tip, they located him in a residence in a local trailer park. He had the same bear mace in his pocket. He told the police he did, and handed it to them.

[9] He was charged with robbery, uttering a death threat, and assault.

[10] Identity and Jurisdiction have been admitted.

[11] It was uncontested that Ms. Goodwin did not consent to any of the activity.

[12] He has conceded the assault was made out. It is clear that all the elements of assault were proven beyond a reasonable doubt. She still has a scar from the bite.

[13] The indictment initially framed the threat charge as follows: “by saying knowingly utter a threat to Sherry Goodwin to cause death to Sherry Goodwin”.

[14] It was amended between the PI and the trial to read: “by saying I will cut your throat or I am going to cut your throat knowingly utter a threat to Sherry Goodwin to cause death to Sherry Goodwin”.

[15] Following the evidence of Ms. Goodwin at trial, it was amended to conform to her evidence and reads: “knowingly utter a threat to Sherry Goodwin to cause bodily harm to Sherry Goodwin”.

[16] Mr. Pictou denies making any threat.

[17] The robbery charge reads or alleges that he, on or about the 8th day of October, 2018, at or near Arcadia, in the County of Yarmouth, Province of Nova Scotia, did steal from Sherry Goodwin, a purse containing money, while armed with an offensive weapon, to wit: a knife and mace gas, contrary to section 344 of the **Criminal Code** of Canada.

[18] Mr. Pictou conceded the evidence established: he stole Ms. Goodwin's purse; the bear mace was an offensive weapon; he possessed it while stealing the purse; and, such possession constituted being armed with it.

[19] He denied having a knife. However, he conceded having the mace gas was sufficient to establish the element of being armed with an offensive weapon. It does not have to be established that he intended to use it.

[20] The elements of the robbery offence are merely that he stole something from Ms. Goodwin, in the sense of taking it away from her and leaving with it, and was armed with an offensive weapon at the time.

[21] During oral argument he contested the robbery charge on the basis that it particularizes that the purse contained money. He says it contained no money and he only took it to access the crack cocaine he expected to be in it, as he was

addicted. He said there were 3 g's of cocaine in the purse which he took and shared with the owner of the residence in the trailer park where he ended up.

[22] During written submissions he also submitted the Crown had failed to prove Mr. Pictou was armed with both a "knife and mace", and, as it had particularized it, was required to do so.

ISSUES

1. Has the Crown proven the threat charge beyond a reasonable doubt?
2. Does the Crown have to prove that the purse contained money and that Mr. Pictou was armed with both a knife and mace?
3. If so, has the Crown proven that the purse contained money?

LAW AND ANALYSIS

Has the Crown proven the threat charge beyond a reasonable doubt?

[23] All witnesses generally provided their evidence in a straightforward un-evasive manner, and maintained appropriate demeanor and attitude, not changing from direct examination to cross-examination. So, assessing credibility and reliability will depend on other factors which will be discussed and considered.

Ms. Goodwin's Evidence

[24] Despite the charge going into the trial having alleged that Mr. Pictou had threatened to cut Ms. Goodwin's throat, she did not testify that he uttered that threat to her, and was not cross-examined in relation to whether he did. However, because it was alleged by way of amendment following the preliminary inquiry, I infer Ms. Goodwin did say, at some point prior to the amendment, that Mr. Pictou had uttered that threat.

[25] At trial she did not describe that threat. Instead she testified that Mr. Pictou, while fiddling with the bear spray, said to her: "I always wanted to fuck you up with this. What are you going to give me not to?"

[26] At first, she thought he was joking. Then he repeated: "What are you going to give me?" She still did not think he was serious. Then just after they went past the police station she felt a sharp object up to her throat, and he told her to keep driving.

[27] She said that out of the corner of her eye it looked like a knife. She was not sure what it was. She said she only saw a flash and black. She said she did not look because she was driving. She could only get a glimpse here and there. That was inconsistent with her evidence that he had a blank look on his face; and, that the look on his face made her realize he was not joking.

[28] She agreed she did not have a knife in her car. The police did not find any knife in the car, nor on Mr. Pictou. However, they did not do a thorough search of the car. Cst. Geneviève Munger-Angers confirmed they did not do a thorough search and that she did not look specifically for a knife.

[29] Ms. Goodwin did not obey Mr. Pictou's command. Instead she turned into the road to his mother's residence. She agreed, on cross-examination, that the road was dark.

[30] Although I had indicated earlier that she had testified that she honked the whole way down, at another point she indicated that she turned into the driveway at the residence while honking the horn, and that is where the scuffle over the purse occurred.

[31] She has a pending charge for possession of cocaine for the purposes of trafficking, which was laid November 1, 2018, with an alleged offence date of October 26, 2018. Both of those dates are after she called the police on October 8. That diminishes the risk she would have provided a story meant to win favour with the police and Crown. However, the fact that charge is still outstanding, does now provide incentive for her to do so.

[32] On the other hand, she admitted she got into selling drugs, adding that she did it to help Mr. Pictou with his drug debts. Despite that, it is still an admission against interest.

[33] She also testified that Mr. Pictou loved her and would not have done what he did, but for the influence of drugs. That indicates she was not "out to get him".

[34] However, the evidence from her and Mr. Pictou that they were still together that evening is inconsistent with the evidence of Cst. Munger-Angers that Ms. Goodwin told her they were no longer together.

[35] Ms. Goodwin said she was not consuming alcohol that evening, and, maybe had a joint earlier in the evening.

Mr. Pictou's Evidence

[36] He said he was fooling around and fidgeting with the pink mace by the passenger door of the vehicle, where he was seated. He gestured a flicking motion with his fingers. He was not trying to harm anyone. He did not point it towards Ms. Goodwin.

[37] He stated "this stuff could fuck you up", meaning anyone. He was not implying anything towards her. He did not make any threats to her.

[38] On direct-examination, he was questioned regarding whether he asked Ms. Goodwin what she was going to give him not to do it. He did not respond directly to the question. Instead he said he knew there were drugs in her purse. He was addicted and had told her she was a trigger. However, she did not get the hint and kept coming around.

[39] On cross-examination, the same question was put to him. He responded that he did not say that to Ms. Goodwin.

[40] When asked about putting something against her throat, he adamantly and firmly expressed that he: did not put anything close to her throat; “never did any action towards her throat”; and, did not have a knife or anything close to it.

[41] He denied telling her to pull over and denied telling her to keep driving.

[42] He testified that, the night of October 8 he was high.

[43] He had consumed at least 5 or 6 g’s of cocaine that day before Ms. Goodwin arrived and then consumed the about 3 g of cocaine that were in her purse with another individual. Constables Hugh Martin and Munger-Angers testified he showed signs of impairment by drug the next evening when they arrested him. He explained that he ran because he heard Ms. Goodwin call 911 and he wanted to get high.

Analysis and Result

[44] There is no evidence to support Ms. Goodwin's evidence that there may have been a knife. Mr. Pictou's evidence was credible and, to some extent, supported by the evidence that Ms. Goodwin did not have a knife in her car, and the lack of evidence regarding anyone having seen him with a knife at any time. When they were struggling over the purse, if there had been a knife, one would have expected it to be dropped and have remained in the car as Mr. Pictou would have been unlikely to have been able to hold the mace and the knife, grab the purse, and engage in a scuffle with Ms. Goodwin at he same time. In addition, if he took a knife with him, it would not make sense that he would keep the mace, but not the knife. More likely than not, there was no knife.

[45] Ms. Goodwin raised the possibility of a knife and, at some point, indicated there was a verbal threat to cut her throat, which she did not repeat at trial. That, in the circumstances, suggests the following possible scenarios.

[46] One scenario is that she was deliberately exaggerating what occurred. She had reason to do so. According to her evidence, and that of Mr. Pictou, they were still in a relationship on October 8. Mr. Pictou agreed that it was not unusual for him to go into her purse and retrieve things. In those circumstances, the police

would be more likely to actively pursue the matter if she presented a very serious scenario. In addition, it would distract the police from focussing on her if they discovered Mr. Pictou with the purse and the cocaine. That motivation is supported by her comment to the police that she and Mr. Pictou were no longer in a relationship, a further element which would divert the focus away from her.

[47] Another scenario is that she misheard and misinterpreted Mr. Pictou's comments, causing her fear, which in turn influenced her perception of what was occurring. That would cause her evidence to be unreliable. "This stuff could fuck you up" is very close to "I always wanted to fuck you up with this". Mr. Pictou may have asked: "What are you going to give me?", knowing she had cocaine, but not connecting the question to his comment about the mace. In a state of fear, she may have mistakenly connected the two, and read in the implication that the was asking what she would give him so that he would not do it.

[48] She did not say he pointed the mace at her. That is consistent with his evidence that he kept it by the door. Further, it would not make sense that a passenger would mace the driver.

[49] Ms. Goodwin turning into a road which she admitted was dark, instead of turning into one of the business locations described by Constable Martin, suggests

she was not as afraid as she indicated, and is contrary to her evidence that she was trying to turn into a lit location. In saying that, I recognize the Crown's argument that there would have been light at the house. However, there was no specific evidence of lighting at the house.

[50] If she was able to look over and see the look on his face even though she was driving, she could, similarly, have looked to see what he was holding.

[51] The honking of the horn can be explained by him reaching back and grabbing her purse. It does not necessarily support a threat having been made.

[52] On the other hand, she was less under the influence of substance than him, though we have no admissible evidence of their effect on perception and memory.

[53] The scenario described by Mr. Pictou makes more sense in the context of two people in a relationship, who have had a nice evening and are just returning from getting a coffee.

[54] His evidence of fiddling with the mace is consistent with hers.

[55] If he did ask what she was going to give him, with a serious look on his face, that would also be consistent with what one might expect an addict asking his

girlfriend for drugs to do, even unconnected to any comment about how bear mace could mess a person up.

[56] In these circumstances, considering the factors I have discussed, Mr. Pictou's evidence raises a reasonable doubt in relation to whether he uttered a threat to Ms. Goodwin to cause bodily harm to her. Therefore, the Crown has not proven the threat charge beyond a reasonable doubt.

Does the Crown have to prove that the purse contained money and that Mr. Pictou was armed with both a knife and mace?

[57] "It is a fundamental principle of criminal law that the offence, as particularized in the charge, must be proved": **R v Saunders**, [1990] 1 S.C.R. 1020, at page 1023; **R v Daoust**, 2004 SCC 6, paras 21 and 22.

[58] The Court in **Saunders**, continued, at pages 1023 and 1024, stating:

> The purpose of specifying the narcotic in a case such as this is to identify the transaction which is the basis of the alleged conspiracy. The fundamental requirement that the charge must provide sufficient particulars to reasonably permit the accused to identify the specific transaction may be met in a variety of ways. … [W]here the Crown is uncertain as to the particular drug which was the subject of the conspiracy, it may properly decline to give particulars of the drug. The charge may nevertheless stand, provided that it sufficiently clearly identifies the alleged conspiracy in some other way.

[59] In that case, there was no request to amend the charge by deleting the reference to the drug being heroin. The Court, at page 1024 stated:

> One of the accused took the stand and testified on this basis. It would be unfair and prejudicial to the accused after that course of events to permit an amendment fundamentally and retroactively changing what the Crown must prove.

[60] The charge was conspiracy to import heroin. That accused had testified he had been involved in conspiracies to import other drugs, but not heroin.

[61] "Particulars define the factual transaction that the prosecution must prove to support a conviction": **R. v. Krymowski**, 2005 SCC 7, at para 18.

[62] An exception to the general fundamental principle is when the particulars constitute surplusage, in which case the Crown must prove only the essential elements of the offence: **R v Largie**, 2010 CarswellOnt 5801 (C.A.), paras 158 and 159.

[63] Our Court of Appeal, in **R. v. B. (T.L.)**, 1989 CarswellNS 182, at para 10, approved of the following comments regarding surplusage:

> If the particular, whether as originally drafted or as subsequently supplied, is not essential to constitute the offence, it will be treated as surplusage, i.e., a non-necessary which need not be proved.

[64] The Court in **R. v. Sadeghi-Jebelli**, 2013 ONCA 747, dealt with an abduction charge which particularized that it was by taking. The child's mother initially consented to the accused taking the child to Iran. Thus, he would not have been guilty of the offence as particularized. However, she later obtained a custody order requiring his return. The Crown presented, as an alternative means of

criminal liability, “detaining or harbouring” after the order was granted. The trial judge left that alternative with the jury and they convicted. The Court of Appeal found that the Trial Judge erred in so doing and that no amendment to the charge should be allowed on the basis that “the amendment would prejudice the defence because it would require the appellant to meet evidence not presented at trial”.

[65] Also, in **R. v. Johnson**, 1977 CarswellBC 28 (C.A.), the charge particularized that the robbery was committed by theft “while armed with an imitation of an offensive weapon, to wit, a starting pistol”. The accused in that case was standing off to the side while his two co-accused dealt with the victim. There was conflicting evidence regarding whether the accused had the starter pistol. The Court concluded that, though the included offence of theft should have been left to the jury, an alternative means of robbery ought not have been.

[66] On the other hand, in **R v Manley**, 2011 ONCA 128, the robbery charge particularized that it was under 344(a) and that in committing the robbery the accused used a firearm which was itself particularized as a sawed-off shotgun. The court concluded that the addition of paragraph (a) was merely to give notice of a minimum sentence and a verdict could be entered for robbery with violence.

[67] As indicated in **R v Vézina**, [1986] 1 SCR 3, at pages 26 and 27, even where particulars would otherwise constitute surplusage, if the accused will be prejudiced in his defence by the Crown not having to prove them, the Crown will be required to prove them. The same principle was cited again in **Hawkshaw v. R.**, [1986] 1 SCR 668, at page 675. However, as noted at pages 28 to 30 of **Vézina,** if the accused is not misled in relation to the alleged transaction or event, or the item or victim involved, the Crown need not prove particulars that are not essential to establish the elements of the offence, as they are only unnecessary detail.

[68] A good example of a particularization which the accused would rely on to identify the transaction alleged is that in the case of **R. v. Wilton**, 2009 SKQB 405, provided by Mr. Pictou. In that case, the charge of dangerous driving particularized that it occurred on a named street. The appellate court concluded it had to be proven; and, upheld the trial court's finding that it had been.

[69] Where multiple particulars are provided, and only one of them is required to constitute the offence charged, the Crown only has to prove the particulars required to constitute the offence: **R v Graham**, 1954 CarswellBC 29 (C.A.), para 13.

[70] If multiple items are alleged to form part of the subject matter of the offence, the Crown need not prove all of the items: **R. v. Kestenberg and McPherson**,

1959 CarswellOnt 35 (C.A.). In that case, the charges particularized three items that had allegedly been stolen. The Crown only proved two. That was found to be sufficient.

[71] The case at hand is distinguishable from that in **R v Sloan**, 1974 CarswellBC 400 (CA), provided by Mr. Pictou. In that case the charge alleged the accused stole "while armed with an imitation of an offensive weapon". The court concluded the Crown was required to prove that. The evidence of the complainant was that what he initially thought to be the barrel of a gun, he discovered was the accused's finger protruding under a sheet. Then the accused ran. As such. The Court found that, in the circumstances, the accused had not armed himself with anything.

[72] In the case at hand, the particularization that Mr. Pictou was armed with a knife and mace alleges two offensive weapons with which Mr. Pictou was armed. They are both items separate from Mr. Pictou's body. The Crown need not prove both. Proving one is enough. The Crown has not proven he was armed with a knife. However, it need not do so because it has proven, and Mr. Pictou has conceded, he was armed with mace.

[73] Plus, the Crown is not advancing an alternative means of committing robbery, such as theft with violence. Therefore, the cases dealing with that situation do not lead to a different conclusion.

[74] In the case at hand, if the words "containing money" were removed from the robbery charge the accused would still know exactly which event, item and victim were alleged. He would know it was alleged he took Ms. Goodwin's purse on the October 8, 2019 date alleged. Removing the reference to the purse containing money would not fundamentally change what the Crown has to prove. The purse itself is an item of value, the taking and removal of which constitutes theft.

[75] The reference to the purse containing money, in the circumstances, could be seen, in effect, as a reference to an extra item that was stolen, rather than a qualifier to identify the particular purse in question. There was only one purse referred to in the evidence. There could be no confusion regarding what purse was being referred to.

[76] Further, even if it was a qualifier to further identify the purse that was stolen, its proof is not required to satisfy the requirements of section 344, and, as such it need not be proved. That was made clear at page 7 of the decision in **Woodhouse v. R.**, 1982 CanLII 2175 (ONSC) provided by Mr. Pictou. It states that "not

everything that is alleged in an indictment is necessary to be proved". It gives an example of a case in which the charge specified the license plate number of a stolen vehicle, but that number was not proven. The court concluded it did not have to be proven because it "served only to further identify the automobile which had been proved to be stolen".

[77] As such, the Crown not having to prove that the purse contained money would not prejudice Mr. Pictou in his defence.

[78] In the event I am wrong in my conclusion in relation to the money, I will assess whether the Crown has proven the purse contained money.

Has the Crown proven that the purse contained money?

Ms. Goodwin's Evidence

[79] She testified she had about $600 in her purse, as she had just received her EI. On cross-examination, she agreed she did not really know how much money was in her purse. She also had a credit card, bank card, ring, and what she referred to as "knickknacks".

[80] She said Mr. Pictou saw her pull out money from her purse when she paid for the coffee at Tim Horton's.

[81] She also confirmed she had been selling drugs and had maybe 1 gram of cocaine in her purse the night of October 8. She mentioned that for the first time at trial, explaining that she was ashamed to mention it.

[82] When it was suggested to her on cross examination, that he was after the drugs, she said she thought he was after both the money and the drugs.

[83] She agreed it was not unusual for him to go into her purse.

[84] She said she bought her purse and wallet back from an unnamed third party who called her and said they had her purse. It contained her bank card and health card, but not any money, nor her visa card. She had initially said she was also missing her bank card, but corrected herself on cross examination, explaining she had cancelled both right away anyhow.

[85] She said she had called Mr. Pictou's parents to see if they could send someone to pick up her purse.

Mr. Pictou's Evidence

[86] He had been using crack cocaine for about 2.5 months and knew there was always some in her purse. Also, while they were watching movies people were

calling her for dope, so he assumed she had some. When they sold dope together, she was the one who carried it in her purse.

[87] After he took the purse, he ran behind his parents' house with it. He took 3 grams of cocaine out of it. He didn't know if there was anything else in her purse.

[88] That appeared to be inconsistent with his evidence almost immediately after, in response to a question regarding whether he took any money, that there was no money in the purse.

[89] He said he left the purse at Kyle's house (ie. the residence in which he was arrested).

[90] On cross-examination he denied carrying cash when he sold crack, and denied that Ms. Goodwin carried cash in connection with her drug trafficking activities. He said they sold using money transactions through the bank. He did not see her put money in her purse while they were selling drugs, except to go shopping or pay for services. It obviously did not make sense that all their buyers would engage in such illegal transactions in a way that was so easily traceable. It would make even less sense for them as sellers to do so.

[91] He agreed he saw Ms. Goodwin pay for the coffee with money. However, he said he did not know where the money came from and he only knew she had enough for a coffee.

[92] He agreed it was possible she would carry money in her purse. He agreed she was working and would have a source of money. However, he said it was not possible that he saw money in her purse that night and did not recall.

[93] He said he gave the purse and all its contents, except for the drugs, to a friend to make sure Ms. Goodwin got it back. He had been talking to her by text the same night as the incident, and told her he would turn himself in.

[94] He did not do so because he was scared and high.

[95] He agreed that he did not remember everything that happens when he is high. However, he remembers everything that night because 6 grams is nothing and when you get high with different people it is a different “vibe”. Otherwise, there was no evidence regarding the effects of crack cocaine on memory.

Analysis and Result

[96] It makes absolutely no sense that they would not deal in any cash while selling drugs. I reject that evidence as being a complete fabrication.

[97] I accept Mr. Pictou's evidence that he was after the drugs in the purse. Given his addiction and relationship with Ms. Goodwin, it makes sense. In those circumstances it would be understandable if he focussed on the drugs in the purse and ignored the other items. He said he gave the purse to a third party to return to Ms. Goodwin. That is consistent with Ms. Goodwin's evidence that she received a call from a third party and received her purse from that person, albeit for a fee. Even if Mr. Pictou was not deliberately falsifying his evidence that the purse contained no money, he could easily have been mistaken on that point.

[98] At least one other person had access to the purse and could easily have taken the money.

[99] Ms. Goodwin had just paid for coffee. She said she retrieved it from her purse. It does not make sense she would have spent every last cent she had on the coffee. It does not make sense that, as a drug dealer, she would not have some cash in her purse.

[100] There was no reason for Ms. Goodwin to exaggerate the amount of money in her purse. It would not accomplish anything other than higher restitution. Her comments that Mr. Pictou only did what he did because of his drug addiction and

use indicates she is not “out to get him”. She acknowledged it was only an estimate.

[101] Her mistake regarding the bank card being missing along with the visa card is reasonably explained by the fact she had cancelled both. Plus, she readily admitted her error, a factor which bolsters her credibility on that point.

[102] In the circumstances, considering all the factors I have discussed, in relation to the question of whether there was money in the purse, I reject Mr. Pictou’s evidence that it did contain any. His evidence does not raise a reasonable doubt on that point, and, considering all of the evidence, I am satisfied, beyond a reasonable doubt that the purse contained money.

CONCLUSION

[103] Based on the foregoing, I find Mr. Pictou guilty of the assault charge and the robbery charge (counts 1 and 3), but not guilty of the threat charge (count 2).

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Pierre L Muise, J.