

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

B E T W E E N :

HER MAJESTY THE QUEEN

and

MAURICE LENNIE



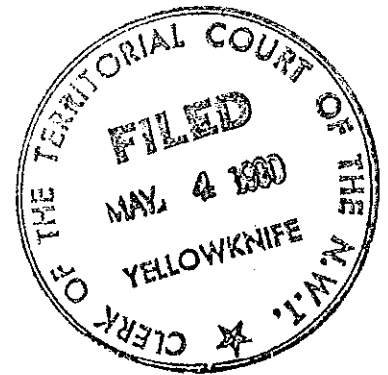
Heard at Yellowknife, N.W.T.

On Tuesday, October 31, 1989

SUPPLEMENTAL REASONS FOR JUDGMENT

of

His Honour Judge R. M. Bourassa



APPEARANCES:

MS. S. AITKEN

Counsel for the Crown

MR. S. TATE

Counsel for the Defence

(Section 270(1)(a) of the Criminal Code)

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The accused is charged with the offence of assaulting a peace officer, contrary to Section 270(1)(a) of the Criminal Code. The defence is that the peace officer concerned was not, at the material times, acting in execution of his duties.

The facts as I have found them following the trial are these: It was near midnight in Fort Norman - a hamlet of approximately 330 people at the mouth of the Bear River where it flows into the Mackenzie River; a community where 'problems' are intimately connected with alcohol abuse by about 60 of the local residents.

Corporal Henderson, while on patrol, saw four intoxicated individuals, including the accused, who was walking with the assistance of his wife. On approaching the accused the Corporal sensed hostility between the accused and his wife. In his words, "It struck me that she was not happy to be where she was She seemed relieved to see the police." Following close observation, the Corporal formed the opinion that Maurice Lennie was too intoxicated to be out and about, and arrested him pursuant to Sections 76 and 120 of the Northwest Territories Liquor Act. He was given the usual "police" caution about speaking, and advised of his charter right to counsel.

Those Sections read:

76.10(1) No person shall be in an intoxicated condition in a public place.

(2) No charge in respect of an offence under subsection (1) shall be laid except with the approval of the Minister responsible for the administration of justice in the Territories.

76.11(1) Where a peace officer finds a person who, in the opinion of the peace officer, is in an intoxicated condition in a public place and is likely to cause injury to himself or to be a danger, nuisance or disturbance to others, he shall apprehend the person and deal with him in accordance with this section.

- (2) A peace officer shall not seek the approval of the Minister under subsection 76.10(2) to lay a charge against a person who violates subsection (1), unless exceptional circumstances exist which would warrant the prosecution of the offence.
- (3) A person apprehended pursuant to this section shall not be held in custody for more than twenty-four hours after being apprehended.

120 Any peace officer may arrest without warrant a person whom he finds committing an offence against this Act or the Regulations.

Mr. Lennie took exception to the arrest. An argument began and then resistance in a defensive way, and finally when touched by the Corporal, offensively. A struggle or fight followed. While Corporal Henderson ultimately prevailed, he was struck and suffered minor injuries; Mr. Lennie somewhat more.

Corporal Henderson's evidence was clear - he wanted to arrest the accused because he felt Mr. Lennie was too intoxicated to care for himself properly, and "any number of things can happen" including "further problems" when intoxicated persons are "out and about".

I pause at this juncture to observe that problems, including criminal conduct, are intimately associated with alcohol abuse. This has been documented, and indeed, is

abundantly evident to any observer. Generally speaking, one would tend to agree with the Corporal that where there are drunks, trouble is not far behind. It is difficult to sit back after the fact and second guess a police officer as to when he should or should not intervene on a practical basis. Not only are the police sworn to uphold the law, but the public looks to them for crime prevention - to preserve the peace. There is therefore a preventative aspect to their work. However, generally speaking our criminal law and system only comes into play after the fact. While it may be wise and prudent to act in anticipation, in the hope of preventing problems, such state action must find a basis in the law to be justified.

I don't think there is any question that the Corporal acted with the best of motives, and that his motives were bona fide in the sense that he believed what he was doing was right in law and in accordance with his general obligations to the public and his duty.

The evidence indicates that Lennie was purportedly arrested pursuant to Sections 76.11 and 120 of the Liquor Act. At no time did the Corporal contemplate an arrest pursuant to 76.10(1) with charges to follow.

Section 120 speaks of arresting a person "found committing an offence..." That would clearly include a prosecution under Section 76.10(1) but not 76.11(1), which latter section does not deal with a prohibition or 'offence'.

Section 76.10 creates an offence, an absolute prohibition, in stating that no one or no person shall be intoxicated in a public place, which would appear, I think, at first blush to indicate a general prohibition. Section 76.11 provides that a person who is intoxicated in a public place, under certain conditions, may be apprehended by a peace officer, but it does not create an offence.

I think at first blush one would assume that Section 76.10 is the general, 76.11 is the specific. However, I am persuaded, after listening to counsel, that really it is the other way around. It would appear that 76.10, while creating a prohibition (identical I note to one in the Criminal Code) is to be invoked or applied only in the words of the Liquor Act in exceptional circumstances where the peace officer may make application to the Minister for the Minister's consent for prosecuting the offence.

It seems that the legislature then has gone on to empower the police to apprehend or arrest without a warrant - but

not charge - anyone who is found intoxicated in a public place, provided that the additional factors are present - likely to cause injury to himself or a danger, nuisance or disturbance to others.

In the eight years I have been on the bench, I have never seen or heard of a prosecution under Section 76.10. There may have been public policy reasons for creating the ministerial approval requirements. And it would appear that the difference between the two is whether or not the police, Crown attorney or Attorney General, prosecuting authorities intend to prosecute the offence as an offence, or whether the intention by the peace officer rather than prosecution is one to secure the peace. And if it is to secure the peace, different conditions or different circumstances apply.

The evidence is clear, other than the Corporal's general concerns related to alcohol abuse and crime, and the mild discomfiture of his wife at the time, there is no basis in law to find that Mr. Lennie was - a) likely to cause injury to himself, or b) to be a danger, nuisance, or disturbance to others.

It follows therefore that no valid grounds existed for the apprehension or arrest of Mr. Lennie pursuant to the Liquor Act.

The evidence disclosed that Mr. Lennie was not a trouble maker, in a criminal sense, in the community and no complaint about him had been received.

Are there other grounds for Mr. Lennie's arrest without a warrant? I cannot find any. There is no evidence to support an arrest based on Section 30 of the Code, breach of the peace. Further, in light of Mr. Lennie's non-criminal or problematic antecedents, no common law power of arrest based on a belief of a pending breach of the peace could be resorted to. (*Hayes vs Thompson et al*, (1985) 18 C.C.C. 3d, 254, B.C.C.A.)

The purported arrest cannot, in my view, be sheltered under the Police's general scope of duty as in *R. vs Dedman*, [1985] 2 S.C.R., 2, as broad as that may be.

Nor can a basis for arrest be built upon Section 495 as Mr. Lennie was not found committing any indictable offence. (*R. vs Guberman*, (1985) 23 C.C.C.)

As ably argued by defence, whatever powers a peace officer has, common law, or statutory, none were available to him in this case on these facts. That being so, the Corporal was acting outside his powers and thereby not within the scope or execution of his duty. The arrest was unlawful.

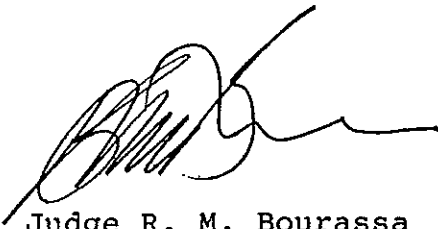
That being the case, Mr. Lennie's resistance was therefore justified.

Can I conclude, or take the second step, and convict for common assault or simple assault as an included offence? I note the Corrier case, where, the police constable in that case acted beyond the scope of the law. However, the facts of that case I think are distinguishable from this one. The first blow, as it were, came from the accused in that case. Here, as I review the facts, once the Corporal determined that the arrest was proper, he argued and remonstrated with the accused for a period of time, and then lifted him into the back seat. It was at that point that the accused struck out punching the Corporal in the face, kicking him in the chest.

Having found that the arrest was unlawful, given the facts that are before me, in my view I don't think I ought to, under all of the circumstances, find the accused guilty of assault. It is unfortunate that things deteriorated, but they did. The court can't approve of what the accused did any more than, as I already indicated, the court can endorse the arrest of an intoxicated person for no other apparent reason than a general concern. That appears to me to be the law.

For that reason then I acquit the accused of resisting arrest. Nor do I find a basis for convicting for common assault. The charge against the accused is dismissed.

In reaching these conclusions I have also considered R. vs Murphy, 58 C.C.C., 2d, N.S.S.C., R. vs Cottam & Cottam, (1970) 1 C.C.C., 117, B.C.C.A., and R. vs Corrier, 7 C.C.C., 2d, 461 N.B.S.C.

A handwritten signature in black ink, appearing to be 'R. M. Bourassa', written in a cursive style with a long horizontal stroke extending to the right.

Judge R. M. Bourassa