IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

JACOB GRIEP

REASONS FOR JUDGMENT
of the
HONOURABLE JUDGE ROBERT D. GORIN

Heard at:	Yellowknife, Northwest Territories December 14, 2005
Date of Decision:	January 27th , 2006
Counsel for the Crown:	S. Smallwood
Counsel for the Accused:	J. Brydon

(Charged under s. 267(b), 733.1(1) CC)

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[1] Before delivering my judgment on this matter, I would like to thank counsel for their capable presentation of the evidence and their thorough written submissions. The written submissions with which I have been provided have been of assistance.

[2] The accused stands charged with two criminal offences arising from the same incident.

[3] The first charge alleges that the accused assaulted the complainant causing him bodily harm contrary to section 267(b) of the *Criminal Code.* The second charge alleges that he breached a probation order, which he was under at the time, by failing to obey the statutory term requiring that he “keep the peace and be of good behaviour” contrary to section 733.1 of the *Criminal Code.*

[4] I will deal first with the charge of assault causing bodily harm.

[5] The incident giving rise to the assault charge occurred in a convenience store. During this brief trial, the Crown, in addition to entering into evidence a certified copy of the probation order which the accused was bound by on the date charged, called three witnesses. The complainant, a store clerk and a police officer who ultimately took the accused into police custody testified during the Crown’s case. The defence called no evidence.

[6] The evidence establishes that the complainant, who is not a peace officer, along with several companions were in a convenience store at about 2:30 a.m. to 3:00 a.m.

The complainant and his companions had just finished a shift bouncing at a local nightclub. The complainant observed the accused come into the store. He further observed that the accused immediately went to the back of the store by some freezers where he stayed for a while. The complainant was at the front of the store by the cash register.

[7] The complainant testified that the store clerk, who was behind the cash register, then asked the accused what he was doing. The accused immediately turned around and started walking up the aisle. The complainant observed that the accused went directly to the store exit which was approximately 25 feet away from where the accused was standing when first asked what he was doing. While the accused was walking to the exit, the clerk tried to get the accused's attention.

[8] The complainant formed the opinion that the accused was trying to leave the store. He formed this opinion because the accused did not appear to be paying attention to the clerk and because he was proceeding directly to the store's exit. The complainant testified that at that point in time, he formed the opinion that the accused was stealing from the store.

[9] The complainant and his companions blocked the path of the accused so that he could not leave. The accused asked them to let him go. The complainant and his companions refused. The accused then attempted to push his way out. The complainant and one of his companions "locked up" the accused's arms and put him on the ground on his back. The accused shoved the complainant off with one arm. The accused managed to get up again. Store items the accused had concealed on his person then fell out of his pants. While the accused was struggling, he asked to be allowed to put the items back stating that everything would be okay. At one point the complainant and his companions locked the exit door. The accused was put on his stomach with his arms held behind his back. His legs were also being held due to the fact that he was kicking. It was at this point that the accused bit the complainant's shin, breaking the skin and leaving a scar.

[10] Following the bite the physical restraint of the accused continued. Ultimately he was turned over to the police who arrived soon after the events described.

[11] In my view the central issues, which require determination, are:

a) The lawfulness of the “citizen’s arrest” made by the complainant and his companions; and
b) If the arrest was not lawful, whether or not the response of the accused was justified.

[12] In approaching and analyzing these issues I, of course, proceed on the basis that the onus is on the Crown to prove the guilt of the accused beyond a reasonable doubt.

[13] It is well established that an arrest requires the actual restraint of the arrestee or that he must submit in a situation where the arrestor has the power of control. Advising a person that he is under arrest is insufficient to constitute a legal arrest unless it is accompanied by the touching of that person or unless the person submits or acquiesces in the deprivation of his liberty. Sir Patrick Devlin in “The Criminal Prosecution in England” (New Haven , Conn., Yale 1958) p. 82, stated:

> Arrest and imprisonment are in law the same thing. Any form of physical restraint is an arrest and imprisonment is only a continuing arrest.

[14] I am satisfied that at the point that the accused’s exit from the store was blocked by the complainant and his companions, he was physically restrained and had been arrested. The arrest simply continued when the accused was further physically restrained by the complainant and his companions. Any compartmentalization of the accused’s arrest would be artificial.

[15] Section 494(1) of the *Criminal Code* provides:

494.(1) Anyone may arrest without warrant

(a) a person whom he finds committing an indictable offence; or

(b) a person who, on reasonable grounds, he believes

(i) has committed a criminal offence, and

(ii) is escaping from and freshly pursued by persons who have lawful authority to arrest that person.

[16] Subsection 494(1)(b) of the *Code* is inapplicable on the facts of this case. There is no evidence that the accused was being pursued by anyone, including the store clerk, who had the lawful authority to arrest him. Rather, the evidence of the complainant and the store clerk establishes that no such pursuit occurred.

[17] The question of whether or not the "citizen's arrest" of the accused was lawful hinges on the applicability of subsection 494(1)(a) whether or not the complainant "found" the accused "committing" an indictable offence.

[18] In the case of *Wiltshire v. Barrett* (1965) 2 All E.R. 271 the Court of Appeal of England considered subsection 6(4) of the *Road Traffic Act*, 1969 (U.K.) c 16, which provided:

6.(4) A police constable may arrest without warrant a person committing an offence under this section.

[19] In *Wiltshire* the matter under appeal was a law suit against an arresting officer for assault and wrongful arrest. Lord Denning at page 274 determined that:

My conclusion is that, on the true construction of s. 6(4), a constable is justified in arresting the driver of a motor car if the driver was *apparently committing* an offence under the section…

[20] At p. 273 Lord Denning held that the words of the section did not empower arrest on reasonable suspicion stating that if parliament intended such a power of arrest, surely it would have stated its intention expressly.

[21] At p. 275 *Wiltshire* states:

> ….I prefer to approach the case in this way: The constable is justified if the facts, as they appeared to him at the time, were such as to warrant him bringing the man before the court on the ground that the man was unfit to drive through drink. In other words, such as to warrant him thinking that the man was probably guilty.… [emphasis added]

[22] The judgment also states at p. 275:

> ….It was not necessary for the constable to prove that the man was actually committing an offence. It is sufficient if he reasonably appeared to the constable to be committing an offence. [emphasis added]

[23] In *Regina v. Biron* [1975] 23 C.C.C. (2d) 513 (S.C.C.) the Supreme Court of Canada expressly adopted Lord Denning's interpretation in determining what was meant by the words used in what was then section 450(1)(b) (now 495(1)(b)) of the *Criminal Code* which provided:

> 495.(1) A peace officer may arrest without warrant
>
> . . . .
>
> b) a person whom he finds committing a criminal offence,

[24] At page 526 of *Biron,* Martland J., writing for the majority of the court stated:

> In my opinion this reasoning can properly be applied to the interpretation of s. 450(1)(b). It is true that the *Wiltshire* case was a civil action for damages, but it

necessitated the judicial interpretation of a statutory provision which is substantially the same. There being no English equivalent of s. 25 of the *Criminal Code* to provide the constable with protection from suit, he could only escape from civil liability for damages if he could establish that he was entitled to make the arrest. His power to arrest without warrant arose in respect of "a person committing an offence under this section". The Court held that he was justified in making the arrest if the person arrested was apparently committing the offence.

. . . .

If the words "committing a criminal offence" are to be construed in the manner indicated in the Pritchard case, para. (b) becomes impossible to apply. The power of arrest which that paragraph gives has to be exercised promptly, yet strictly speaking, it is impossible to say that an offence is committed until the party arrested has been found guilty by the Courts. If this is the way in which this provision is to be construed, no peace officer can ever decide, when making an arrest without a warrant, that the person arrested is "committing a criminal offence" In my opinion the wording used in para. (b) which is over simplified, means that the power to arrest without a warrant is given where the peace officer himself finds a situation in which a person is apparently committing an offence. [emphasis added]

[25] The meaning of the words "a person whom he finds committing an indictable offence" has been further refined by the Supreme Court of Canada in *Roberge v. The Queen* (1983), 4 C.C.C. (3d) 304 (S.C.C.) (Q.L.). Once again the case had to do with an arrest by a police officer pursuant to what was then section 450(1)(b) (now section 495(1)(b)) of the *Criminal Code*. In referring to the majority decision in *Biron*, Lamer J., on behalf of a unanimous court, stated at p. 9:

The disagreement between the judges of this court in *Biron* was as regards the test when applicable to a party resisting arrest. I have underlined the test the

> minority recognized as applicable to the arresting officer when he is the accused. The majority would have the same test for the arresting party and the party being arrested. As regards the accused arrestor, I see no disagreement even though the majority refer only to apparently committing. Indeed I do not read the test laid down by Martland J. as suggesting that it is sufficient that it be "apparent" to the police officer even though it would be unreasonable for the police officer to come to that conclusion. Surely it must be "apparent" to a reasonable person placed in the circumstances of the arresting officer at the time. [emphasis added]

[26] I am alive to the fact that the store clerk's evidence was that he actually saw the accused stealing store items and that he asked the accused to pay. He stated that the accused refused and tried to leave and that it was at that point the accused was stopped by the complainant and his companions. The store clerk did not say that at any point he himself pursued the accused. Rather, he stated that he was waiting on customers at the relevant point in time.

[27] The store clerk may well in fact have told the accused to pay for the items he saw the accused taking. However, in determining the validity of the arrest, the question is what was known to the complainant at the point when the accused was arrested.

[28] To summarize, the complainant said that he observed the store clerk ask the accused what he was doing and the accused then immediately proceeded to the exit which was approximately 25 feet away while the clerk continued to attempt to get the accused's attention.

[29] On the evidence before me, I find that the accused was not apparently committing an offence prior to his arrest. On the evidence I have before me, the complainant may well have had a reasonable suspicion that the accused was committing a theft. However, there was an inadequate foundation for the arrest. In hindsight it is quite clear that the accused was in fact committing an offence. However, the cases I have already referred to provide that whether or not the person arrested was

actually committing an offence is not the test for determining the lawfulness of a "citizen's arrest" pursuant to section 494(1)(b) of the *Code*. I find that on the evidence I have before me, the test as set out in *Roberge* was not fulfilled. Therefore, the Crown has not established that the complainant and his companions were entitled to physically restrain the accused by preventing him from leaving the store or further restraining him by holding him and putting him on the floor. Rather, based on all of the evidence I have before me, I am satisfied that the arrest of the accused was unlawful.

[30] I do not dispute that the person making an arrest pursuant to section 494(1)(b) is entitled to partially rely on what he has been told by others. I do not dispute that the person making the arrest is entitled to draw inferences.

[31] This is not a case of somebody hearing the words "Stop thief!", immediately seeing a person in flight then arresting him. In the present case, if the complainant had heard the store clerk ask the accused to pay for the items that the clerk says he saw the accused take, my view of the lawfulness of the accused's arrest would be different than it is.

[32] It is true that during the struggle, items fell out of the accused's pants. However, this happened only as a result of the unlawful arrest of the accused. The unlawful arrest did not then somehow become lawful at the point that the stolen items were observed. If the items had fallen out of the accused's pants prior to the initial restraint of the accused and been observed by the complainant, once again, my view of the lawfulness of the arrest would be different than it is.

[33] I add that there has been no suggestion that the restraint of the accused by the complainant and his companions was a lawful investigative detention of some sort.

[34] If the arrest of the accused was unlawful, the accused was being unlawfully confined when he was stopped from leaving the store and was being both unlawfully confined and assaulted at the time that he bit the complainant on the shin. I find that the

defense of self-defense provided for by section 34 of the *Criminal Code* has an air of reality to it. Consequently, I must determine whether or not the Crown has proved beyond a reasonable doubt that the accused was not acting in self-defense in biting the complainant on the shin or whether his response was excessive or otherwise outside the scope of s. 34.

[35] I find that the assault on the person of the accused was not provoked within the meaning of that section. I find that the accused's response was not more than was necessary. The accused had been forced to the ground. He was lying on his stomach. His arms were locked up behind his back. His legs were being held. The law is clear that he does not have to measure his response with nicety. His options were limited.

[36] I find that on all of the evidence, the Crown has not proved beyond a reasonable doubt that the accused was not acting in self-defense. Given all of the circumstances I find that the accused's actions were not excessive or otherwise outside the scope of s. 34.

[37] I find him not guilty of the charge of assault causing bodily harm.

[38] There remains the charge of breach of probation. As stated, a certified copy of the probation order was entered into evidence as exhibit 1. The term of the probation order which is alleged to have been breached is the statutory term requiring that the accused keep the peace and be of good behavior. In her initial oral submissions Ms. Smallwood, on behalf of the Crown and with characteristic fairness, took the position that the Crown was seeking a conviction on the charge of breach of probation only in the event of a finding of guilt on the assault charge. The Crown is not asking me to consider whether or not it has been proved beyond a reasonable doubt that on the date charged the accused failed to abide by term in question by committing any other lawful act such as theft, attempted theft or possession of stolen property.

[39] I am content to proceed on that basis and accordingly find the accused not guilty of the charge of breach of probation.

[40] Acquittals will be entered on both charges.

Robert D. Gorin
J.T.C.

Dated at Yellowknife, in the Northwest Territories
this 27th day of January, 2006

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