

Citation: *R. v. Moss*, 2020 YKTC 45

Date: 20200603
Docket: 16-00666
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Chief Judge Chisholm

REGINA

v.

DAVID JOHN MOSS

Appearances:
Benjamin J. Eberhard
Amy Steele

Counsel for the Crown
Counsel for the Defence

RULING ON *VOIR DIRE*

[1] CHISHOLM C.J.T.C. (Oral): David Moss is charged that he resisted arrest and assaulted a peace officer. The police initially arrested him for causing a disturbance, a summary conviction offence. Mr. Moss argues that his right not to be arbitrarily detained pursuant to s. 9 of the *Charter* was violated and applies to have all evidence obtained as a result of his arrest excluded pursuant to s. 24(2).

Summary of the Relevant Evidence on the *Voir Dire*

[2] Three RCMP witnesses testified on the *voir dire*. Mr. Moss did not call any evidence.

[3] Mr. Moss attended at the Whitehorse RCMP detachment in the early hours of November 30, 2016. After having entered the building, he did not wait for assistance and departed in short order. However, Mr. Moss's brief presence in the building attracted the attention of Cst. McRorie. By way of a live feed video close to the officer's desk, he noted Mr. Moss. The officer observed that he was having difficulty exiting the door. He observed Mr. Moss stumble and lean against the wall. Before going to assist him, he advised his colleagues.

[4] Cst. McRorie located Mr. Moss outside on an accessibility ramp. He observed Mr. Moss grabbing the ramp railing and falling to the ground. The officer ran to assist him. Mr. Moss indicated that he had suffered a head injury, which prompted Cst. McRorie to contact Emergency Medical Services ("EMS") for assistance.

[5] Subsequently, Mr. Moss pulled himself up and started walking away. Cst. McRorie walked with him. The defendant initially indicated that someone had thrown him out of a car and hit him in the head with a pipe, but later stated that he had been hit by a car. Mr. Moss's stated intentions alternated between telling the officer that he intended to walk to the hospital and indicating that he planned to return to Atlin, a community a few hours' drive from Whitehorse. Mr. Moss became upset and began yelling loudly. Cst. McRorie described him as continuously walking away.

[6] Cpl. Hack recalled that it was a cold evening. He testified that he initially observed Mr. Moss interacting with Cst. McRorie at the detachment. Cpl. Hack overheard Mr. Moss stating that he had been struck in the head with a pipe. Cpl. Hack noted that Mr. Moss was swaying and having difficulty with his balance as he walked

away from the detachment. Cpl. Hack followed Cst. McRorie who was trying to assist Mr. Moss. He observed Mr. Moss shouting that Cst. McRorie was not helping him.

[7] Cpl. Hack testified that Mr. Moss walked from the sidewalk into the street in front of the detachment where he turned around and attempted to kneel down. The officer was concerned that because of the dark clothing that the defendant was wearing, if he kneeled down in the middle of 4th Avenue, he would be struck. As a result, Cpl. Hack moved onto the roadway to try to assist. He and Cst. McRorie succeeded in having Mr. Moss move off the roadway and onto the sidewalk on the opposite side of the street from the police detachment.

[8] Cpl. Hack described Mr. Moss as being unpredictable in that his behaviour alternated from being calm and willing to talk to becoming agitated, resulting in yelling, screaming, and making accusations of the police being unwilling to assist him. When asked to provide details as to what had happened to him, he was either unwilling or unable to do so. Cpl. Hack believed that his mood swings were inconsistent with those of a sober person. He did not observe any injuries, even though Mr. Moss initially described being hit in the head with a pipe and, subsequently, that he had been thrown out of a car.

[9] Cpl. Hack was concerned about Mr. Moss's welfare and offered him a ride to the hospital. Mr. Moss declined even though he talked about going to the hospital on his own. Cpl. Hack was worried that if he went off on his own, he would not make it to the hospital. He stated in cross-examination that if Mr. Moss had decided to leave on his

own, he would have followed him, as he was concerned that he might end up lying down in a snowbank.

[10] Cpl. Hack indicated that Mr. Moss engaged in dialogue with the officers when not agitated, and he remained at the street corner.

[11] Cpl. Hack testified that snow removal personnel were working close to the area where this incident occurred. He also indicated that there is an apartment building on the block where his interactions with the defendant took place. He additionally noted that although he was not keeping track, there was some traffic on 4th Avenue at the time of the incident. He recalls observing some traffic because he was concerned about Mr. Moss being struck.

[12] Other officers learned of what was occurring outside the detachment. Cst. Tillman testified that he exited the building and observed police officers and Mr. Moss on the other side of 4th Avenue, approximately 100 metres from the RCMP detachment.

[13] Cst. Tillman heard yelling and screaming almost as soon as he exited the building. He went to the scene to provide backup to the other officers. He testified that based on his observations, Mr. Moss was either intoxicated, or suffering from a mental health issue. Mr. Moss appeared frustrated and complained that the police were not helping him with his issue. The defendant indicated that he did not want to continue to deal with the police.

[14] EMS arrived to assist Mr. Moss. Cpl. Hack testified that initially, Mr. Moss appeared interested in cooperating with the emergency medical personnel. However, he then became upset with them and commenced yelling again. As he entered the roadway once more, and commenced walking towards the building on the opposite side of the street, Cpl. Hack arrested him for causing a disturbance.

[15] Cpl. Hack testified that Mr. Moss became resistant and physical with police, including trying to kick the officers. He pulled the sleeves of his sweater around his wrists, which Cpl. Hack believed was an attempt to prevent police from handcuffing him.

[16] Once police secured Mr. Moss, he was escorted towards the detachment. While walking through the parking lot, Cst. Tillman testified that he was walking behind Mr. Moss and had an open hand on him to move him along. He stated that the defendant moved his head forward in a loading motion, before thrusting it back into the officer's face. The point of contact was above Cst. Tillman's right eye. He described that area becoming swollen and red as a result of the contact.

[17] Cpl. Hack described the incident as Mr. Moss stiffening up, planting his feet, and driving his head backwards into Cst. Tillman's face. The officer staggered backwards after being struck. Cpl. Hack then arrested the defendant for assaulting a peace officer.

Positions of the Parties

[18] The defence submits that the police did not find Mr. Moss committing a criminal offence, as required under s. 495(1)(b) of the *Criminal Code*. As such, the defence

argues that a violation of s. 9 of the *Charter* occurred and applies to have evidence with respect to the charges he faces excluded pursuant to s. 24(2).

[19] The defence contends that the evidence on the *voir dire* demonstrates that the police did not have the requisite grounds to arrest Mr. Moss, and therefore the arrest was unlawful. The defence submits that Mr. Moss was attempting to remove himself from the presence of the police, which is inconsistent with him disturbing the public peace. It is also argued that as the Crown led no direct evidence of anyone being disturbed by the actions of Mr. Moss, the legal test for causing a disturbance cannot be met. Therefore, the defence maintains that the arrest of Mr. Moss was unlawful and arbitrary.

[20] The Crown takes the position that the police clearly had grounds to arrest Mr. Moss and suggests that Mr. Moss is asking the Court to apply a higher standard than that.

[21] The Crown argues that even if it is determined that a *Charter* breach occurred, the Court should not exclude the evidence after having considered the analysis in *R. v. Grant*, 2009 SCC 32.

Analysis

[22] Section 495 of the *Code* reads:

(1) A peace officer may arrest without warrant

...

(b) a person whom he finds committing a criminal offence...

[23] The Crown has the burden of proof of establishing that the warrantless arrest of Mr. Moss was lawful (*R. v. Collins*, [1987] 1 S.C.R. 265).

[24] The decision in *R. v. Biron*, [1976] 2 S.C.R. 56, held that the power to arrest under this section of the *Code* is given where a police officer finds a person “apparently committing an offence”. The Court stated, at p. 72:

Paragraph (b) applies in relation to any criminal offence and it deals with the situation in which the peace officer himself finds an offence being committed. His power to arrest is based upon his own observation. Because it is based on his own discovery of an offence actually being committed there is no reason to refer to a belief based upon reasonable and probable grounds. [Emphasis added]

[25] In *R. v. Roberge*, [1983] 1 S.C.R. 312, the Court again discussed this issue and found that whether a person was found apparently committing an offence, “... must be ‘apparent’ to a reasonable person placed in the circumstances of the arresting officer at the time” (p. 324).

[26] In *R. v. Lotfy*, 2017 BCCA 418, leave to appeal ref’d [2018] S.C.C.A. No. 14, Frankel, J.A. summarized the legal principles applicable to an arrest without warrant pursuant to s. 495(1)(b) of the *Code*:

33 When an arrest has been made pursuant to s. 495(1)(b) of the *Criminal Code* the Crown must establish that the arresting officer had reasonable grounds to believe the person arrested was committing a criminal offence in the officer's presence: *R. v. Roberge*, [1983] 1 S.C.R. 312 at 323-325; *R. v. Abel & Corbett*, 2008 BCCA 54 at para. 52, 229 C.C.C. (3d) 465; *R. v. Gonzales*, 2017 ONCA 543 at para. 103, 136 O.R. (3d) 225. As Justice Hall stated in *R. v. Boyd*, 2013 BCCA 19 at para. 6, 332 B.C.A.C. 85, “A peace officer exercising the arrest power [under s. 495(1)(b)] must provide some sensible reason for believing an offence was being committed by the person arrested.”

34 A two-part test is applied in determining the validity of a warrantless arrest: *R. v. Storrey*, [1990] 1 S.C.R. 241 at 250-251. In the context of s. 495(1)(b) the first stage involves factual determinations: (a) whether the arresting officer subjectively believed the person arrested was committing a criminal offence in the officer's presence; and (b) the grounds for such belief, i.e., the factual matrix that informed the officer's decision.

35 If the Crown proves the officer held the requisite subjective belief, then the second stage involves determining whether the officer's grounds for that belief are objectively reasonable. This is a question of law: *R. v. Shepherd*, 2009 SCC 35 at paras. 18-20, [2009] 2 S.C.R. 527; *R. v. MacKenzie*, 2013 SCC 50 at para. 54, [2013] 3 S.C.R. 250. It involves determining whether, from an objective perspective, it was reasonable for the officer to believe he or she had come across someone in the very act of committing a criminal offence. The officer's training and experience are relevant in assessing objective reasonableness. *MacKenzie* at para. 73; *R. v. Wilson*, 2012 BCCA 517 at para. 26, 99 C.R. (6th) 76, leave to appeal ref'd, [2013] 3 S.C.R. xii.

[27] After observing Mr. Moss's uneven and unusual behaviour, both before and after EMS's attendance, Cpl. Hack made the decision to arrest him for causing a disturbance.

[28] The law is clear that in order to commit the offence of causing a disturbance, the conduct of the defendant must give rise to an "externally manifested disturbance of the public peace" (*R. v. Lohnes*, [1992] 1 S.C.R. 167).

[29] Importantly, however, the validity of an arrest does not depend on the defendant ultimately being found guilty, but rather on the circumstances apparent to the arresting officer at the time of the arrest (*R. v. Biron*; *R. v. Anderson* (1996), 84 B.C.A.C. 18, at para. 43).

[30] The *Lotfy* decision also speaks to this issue:

57 To a great extent, Mr. Lotfy's argument conflates the approach to be taken in determining whether objective reasonable grounds existed to that which applies in determining whether the Crown has proven guilt beyond a

reasonable doubt. As has been stated many times, there is no equivalency between the two concepts. This is reflected in this Court's recent judgment in *R. v. Hanareh*, 2017 BCCA 7, wherein Justice Fitch said this:

[38] In *R. v. Storrey*, [1990] 1 S.C.R. 241 at 250-251, the Court held that there is a subjective and objective element to the test for a lawful arrest under s. 495(1)(a):

In summary then, the *Criminal Code* requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a *prima facie* case for conviction before making the arrest.

[39] The reasonable grounds standard requires something more than mere suspicion, but something less than the standard applicable in civil matters of proof on the balance of probabilities: *Mugesera v. Canada (Minister of Citizenship & Immigration)*, 2005 SCC 40 at para. 114. The appropriate standard is one of reasonable probability: *R. v. Debot*, [1989] 2 S.C.R. 1140 at 1166. Reasonable or credibly-based probability contemplates a practical, non-technical and common sense evaluation of the probability of the existence of facts and asserted inferences: *R. v. Sanchez* (1994), 93 C.C.C. (3d) 367 at 367 (Ont. Ct. (G.D.)).

[40] Determining whether reasonable and probable grounds exist requires an assessment of the "totality of the circumstances": *R. v. Debot* at 1168.

[Emphasis added.]

See also: *R. v. Jir*, 2010 BCCA 497 at para. 27, 264 C.C.C. (3d) 64.

[31] The decision in *R. v. Okemow*, 2009 SKPC 82, considered the difference between a police officer's grounds for belief and the standard of proof beyond a reasonable doubt in a cause disturbance setting. In that matter, the Court found Ms. Okemow not guilty of the offence of causing a disturbance because the Crown had not proved beyond a reasonable doubt that anyone had been disturbed by her actions.

[32] However, despite this acquittal, in determining whether Ms. Okemow had assaulted the investigating officer post-arrest, the Court found that the officer possessed reasonable grounds to arrest for causing a disturbance, based on a number of factors articulated by the officer.

[33] The Court stated at para. 85:

Therefore, the acquittal of the accused on the charge of causing a disturbance does not mean the arrest of the accused for that offence was unlawful. Constable Tryon had reasonable grounds to arrest the accused for causing a disturbance. ...

[34] I find the evidence of Cpl. Hack to be very reliable. It was both balanced and detailed, and was not effectively challenged on cross-examination. Where his evidence differs from the other officers, I accept his evidence. I do so since he was more engaged with Mr. Moss during the incident and displayed a very strong recollection of all aspects of the incident. His evidence that Mr. Moss was engaging in conversation with him, when not yelling and shouting, and that Mr. Moss remained with the officers at the corner of the street until the arrival and attempted assistance of EMS, is consistent with the evidence of all three officers that they were still in close proximity to the detachment when EMS attended.

[35] Cpl. Hack articulated his grounds for arrest as follows: he interacted with Mr. Moss, who in an apparent intoxicated state was yelling and shouting periodically; he observed a city work crew in the vicinity; he observed EMS attendants attempting to assist Mr. Moss while he yelled and swore; he noted that the incident was occurring on the same block as an apartment building; and he noted traffic on the avenue where the incident was taking place.

[36] In Cpl. Hack's testimony, he also testified that he had noted other police officers exit the detachment to assist. He was of the view that those officers had come outside because Mr. Moss's shouting was at a high volume.

[37] Defence counsel questioned Cpl. Hack about not following up with the investigation, specifically not questioning motorists or residents of the apartment building about the incident. However, at the arrest stage, a police investigation need not be fully completed. This is because police are often working with an evolving situation and must, at times, make decisions quickly. It is clear, for example, that the police could not have been expected to interview the city workers or residents of the apartment building to determine if they had been disturbed, prior to deciding whether to arrest Mr. Moss.

[38] The question to be determined in this *voir dire* is whether Cpl. Hack had grounds to support the requisite subjective belief that Mr. Moss was causing a disturbance, and if so, whether the grounds for that belief are objectively reasonable.

[39] Cpl. Hack responded to Mr. Moss's initial complaint of having been assaulted. This interaction led him to have concerns about Mr. Moss's welfare. I accept that

Cpl. Hack's concern for Mr. Moss stemmed from his erratic and unpredictable behaviour. At the same time, I find that Cpl. Hack possessed the grounds to support his belief that Mr. Moss was causing a disturbance.

[40] In considering Cpl. Hack's grounds on a common sense basis, I am cognizant that Mr. Moss was periodically yelling and shouting outside in a quasi-residential area in the middle of the night. There was a city work crew nearby and some traffic on the thoroughfare. Mr. Moss's loud outbursts continued when EMS personnel were on scene.

[41] Looking at the totality of those factors, I am of the view that the officer's grounds for arrest were objectively reasonable.

[42] Accordingly, I find that the arrest of Mr. Moss was lawful. The evidence led in this *voir dire* is therefore admissible in the trial proper.

CHISHOLM C.J.T.C.