IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Her Majesty the Queen* v. *E.B.K.,* 2003 YKSC 63

Date: 20031222
Docket: S.C. 02-AP0019
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

Appellant

And:

E.B.K.

Respondent

Appearances:

Narissa Somji	Counsel for the Appellant
Elaine Cairns	Counsel for the Respondent

Publication of identifying information is prohibited by section 110(1) of the *Youth Criminal Justice Act*.

Before: Mr. Justice Veale

REASONS FOR JUDGMENT

INTRODUCTION

[1] This case is about the interpretation of s. 87 of the *Liquor Act*, R.S.Y.T. 1986, c. 105, which permits a peace officer to take a person in an intoxicated condition into custody. The person cannot be held for more than 12 hours and shall be released when they have recovered or can be released into the care of another person. The Crown appeals the judgment of Judge Stuart, who found that E.B.K. was not lawfully taken into custody pursuant to s. 87 of the *Liquor Act*.

[2] E.B.K. is a female youth, who slapped a peace officer and spit in his face when he took her into custody under s. 87. Thus, if taking her into custody under s. 87 of the *Liquor Act* was lawful, she is guilty of resisting arrest and assaulting a peace officer.

THE FACTS

[3] E.B.K. was a 16-year-old youth when the events took place.

[4] Cpl. Cashen was the only person who testified. He described three occasions when he came into contact with E.B.K. in the early morning of June 14, 2002. He was watch commander in charge of the night shift from 7:00 p.m. to 7:00 a.m.

[5] At 3:44 a.m. on June 14, 2002, the police received a call reporting a disturbance of a female screaming and fighting possibly between two male youth at the end of Taylor Street in Whitehorse. Cpl. Cashen attended at the scene and found E.B.K. and S.R., a male youth. He asked them to get into the back of the police car and they did.

[6] In his opinion, they were intoxicated by the consumption of alcohol. He observed that E.B.K.'s eyes were heavy, she had a smell of alcohol on her breath, she was somewhat loud and her walk was somewhat unsteady. He found that neither youth was in a state of intoxication where they would be passing out. He described E.B.K. as being moderately, or a little better than moderately intoxicated. She was able to walk, talk and understand what he was saying to her. Her level of intoxication was the same on each occasion that Cpl. Cashen observed her that morning.

[7] He did not find any liquor. He found no threat of violence. He released them with a caution to keep the noise down and continue on their way to 403 Jeckell, some two blocks away.

[8] The second incident occurred at 4:22 a.m., when Cpl. Cashen received a complaint of people fighting in the area of 4th Avenue and Robert Service Way. He drove up in a marked police car and spoke to E.B.K. S.R. was some distance away and there was some yelling and screaming back and forth between E.B.K. and S.R. He cautioned her that she was underage and intoxicated, and if she failed to go home, he would arrest her for underage drinking and intoxication. He watched as she returned home to Jeckell St. and entered her residence through the back door. Cpl. Cashen said he took the second incident more seriously, but he felt that S.R. was headed home and the situation would resolve itself.

[9] On the third occasion, at approximately 4:40 a.m., Cpl. Cashen was patrolling 4th Avenue, near Robert Service Way. He had eye contact with E.B.K., who proceeded to run across Robert Service Way and, as he observed, failed to look in either direction. Cpl. Cashen did not make notes of this observation, nor did his evidence explain how he made the observation. The trial judge found that the evidence did not establish that E.B.K. failed to look. There was no traffic in the area, it was daylight, and nothing obstructed the view of oncoming traffic. Cpl. Cashen concluded that she was putting herself at risk with the traffic and possibly becoming involved in another argument with S.R., although he was not aware of S.R.'s presence at the time of the arrest. He believed that "the threat of additional disturbances on that morning were there." He chased E.B.K. on foot, caught her and advised her she was under arrest for public intoxication and underage drinking. He took her back to the police car, where E.B.K. slapped Cpl. Cashen in the face and spit on his left cheek.

[10] She was then advised that she was under arrest for assaulting a police officer and resisting arrest. Her conduct did not improve thereafter. The case has been argued on the basis of whether or not E.B.K. could be lawfully taken into custody under s. 87 of the *Liquor Act*. The Crown did not address the issue of arrest for underage drinking, as no charge was laid for that offence.

[11] I will mention the conduct of E.B.K. after arrest only because it may have implications with respect to the issue of when a person in an intoxicated condition should be placed in the care of another person. While being taken to, and while at, the RCMP detachment, E.B.K. yelled threats and racial slurs at Cpl. Cashen. She refused to cooperate at the detachment and threw her rings on the floor when asked to empty her pockets and take off her shoes. One of the rings struck a police officer. Cpl. Cashen required the assistance of Cst. Bear and the matron on duty to complete the search and lodge her in a cell. E.B.K. continued to try to spit on everybody present in the cell area.

[12] Cpl. Cashen testified that E.B.K. was lodged in cells without the opportunity to speak to a lawyer because of her violent nature at that time. At 7:05 a.m., he attended the residence of E.B.K. and spoke with her father, who was aware that she was in custody. He advised her father that there would be a formal Notice to Parent, that she would be charged with resisting arrest and assaulting a peace officer, and that she would be released to his custody by the day shift.

ISSUES

[13] There are three issues to address:

1. What is the interpretation of “intoxicated condition” as defined in the *Liquor Act*?

2. Did the peace officer have reasonable and probable grounds to detain E.B.K. under s. 87 of the *Liquor Act*?
3. To what extent is a peace officer required to seek someone to take care of an intoxicated person before taking such person into custody under s. 87 of the *Liquor Act*?

The Legislation

[14] The relevant provisions are the definition section and ss. 86 and 87 of the *Liquor Act* as follows:

> **Interpretation**
>
> … "intoxicated" and "intoxicated condition" each mean the condition a person is in when his or her capabilities are so impaired by liquor that he or she is likely to cause injury to himself or herself or be a danger, nuisance or disturbance to others;
>
> **Intoxicated persons in public places**
>
> 86.(1) No person shall be in an intoxicated condition in a liquor store or licensed premises.
>
> (2) No person shall be in an intoxicated condition in a public place.
>
> (3) No prosecution shall be taken against any person pursuant to subsection (2) of this section except on the written consent of the Executive Council Member or an officer authorized by him in that behalf.
>
> **Taking intoxicated persons into custody**
>
> 87.(1) Where a peace officer has reasonable and probable grounds to believe and does believe that a person is in an intoxicated condition in a public place, the peace officer may, instead of charging the person under section 86, take the person into custody and deal with the person in accordance with this section.
>
> (2) A person taken into custody under this section shall not be held in custody for more than 12 hours after being taken into custody and shall be released from custody at any time if there are reasonable and

probable grounds for the person responsible for his custody to believe that

(a) the person in custody has recovered sufficient capacity that, if released, he or she is unlikely to cause injury to himself or herself or be a danger, nuisance or disturbance to others, or

(b) a person capable of doing so undertakes to take care of the person in custody upon his or her release.

(3) No action lies against a peace officer or other person for anything done in good faith and without negligence with respect to taking into custody, holding in custody or releasing a person under this section.

(4) Where a minor is taken into custody under this section, the peace officer who takes him or her into custody shall, as soon as practicable, make reasonable efforts to notify the minor's parent or an adult person who ordinarily has the care of the minor that the minor is in custody.

[15] I note that these sections are now numbered ss. 91 and 92, but I will continue to refer to them as ss. 86 and 87, as those are the sections used in the decision under appeal.

The Trial Court Decision

[16] Judge Stuart found that E.B.K. was not intoxicated to the extent required by s. 87 of the *Liquor Act*. He further found that the conditions at the time of arrest did not pose a danger to anyone. In other words, it was daylight and there was no traffic. He made a specific finding that the evidence of Cpl. Cashen did not establish that E.B.K. failed to look when she ran across the highway.

[17] Judge Stuart stated that the primary purpose of the provisions was prevention of injury to the drunk person or others. It was not an offence to be drunk in a public place. Rather, he stated that a peace officer must not unduly interfere with the rights and

freedoms of citizens even when drunk, unless the officer has a subjective belief that the person's capabilities are so impaired by liquor and that belief is objectively justified.

[18] In Judge Stuart's view, the case law can be categorized in two ways. Firstly, the cases like *R.* v. *Venton*, [2000] Y.J. No. 145 (Y. Terr. Ct.) at para. 16, that suggest when a person is extremely impaired, no prospect of injury is required. The second line of cases requires sufficient impairment of a person and that injury to the person or others is likely to occur (*R.* v. *James*, [1987] Y.L.R., Vol. 2, 488 (Terr. Ct.) August 20, 1987; *R.* v. *Carlick*, Territorial Court of Yukon, November 5, 1987; and *R.* v. *Hunter*, [1992] Y.J. No. 27 (Y. Terr. Ct.).

[19] Judge Stuart concluded, at paragraph 24, that, consistent with the prevention and safety object of the legislation, there are two grounds for detention:

1. A degree of intoxication that renders the person incapable of preventing injury to himself or another; or
2. A state of impairment at least equivalent to being arrested for impaired driving, coupled with a set of circumstances that poses a high risk of injury.

[20] Further, at paragraph 31, he stated:

> The evidence fails to establish the objective grounds for the officer's reasonable belief either that:
>
> 1) The accused was, because of her intoxication, incapable of avoiding injury to herself or other, or
>
> 2) there was a sufficient likelihood of injury to herself or others.

[21] Judge Stuart concluded that, before detention, the police must be diligent in seeking someone to take care of the intoxicated person and, once detained, continue to

exercise due diligence to find a safe alternative to detention. He stated that the peace officer, after the decision to detain E.B.K., had an obligation, where reasonably possible, to inform her of the intention to take her home or place her in the care of an appropriate person.

ANALYSIS

ISSUE 1: What is the interpretation of "intoxicated condition" as defined in the *Liquor Act*?

[22] This is an issue of statutory interpretation and I will be guided by the following principles:

1. As set out in s. 10 of the *Interpretation Act*, R.S.Y.T. 1986, c. 93, "Every enactment and every provision thereof shall be deemed remedial and shall be given such fair, large and liberal construction and interpretation as best insures the attainment of its objects."
2. As stated by E.A. Driedger in *Construction of Statutes* (2nd ed.) 1983, at p. 87, the modern approach to statutory interpretation requires that the words of an *Act* "be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament." This approach has been adopted on numerous occasions in the Supreme Court of Canada (*Markevich* v. *Canada*, [2003] S.C.J. No. 8).
3. In *R.* v. *Heywood*, [1994] 3 S.C.R. 761 at p. 784, it was stated: "If the ordinary meaning of words is consistent with the context in which the words are used and with the object of the act, then that is the interpretation which should

govern." I note that in the third edition of *Driedger on the Construction of Statutes* by Ruth Sullivan, 1994, at p. 7, she expands upon the ordinary meaning rule as follows:

> (1) It is presumed the ordinary meaning of a legislative text is the intended or most appropriate meaning. In the absence of a reason to reject it, the ordinary meaning prevails.
>
> (2) Even where the ordinary meaning of a legislative text appears to be clear, the courts must consider the purpose and scheme of the legislation, and the consequences of adopting this meaning. They must take into account all relevant indicators of legislative meaning.
>
> (3) In light of these additional considerations, the court may adopt an interpretation in which the ordinary meaning is modified or rejected. That interpretation, however, must be plausible; that is, it must be one the words are reasonably capable of bearing.

[23] The object of this legislation is to prevent intoxicated persons from causing injury to themselves or being a danger, nuisance or disturbance to others. Section 87 of the *Liquor Act* provides an alternative to the cumbersome requirement of ministerial consent to prosecute a person for being intoxicated in a public place. It permits a peace officer to take a person into custody for up to 12 hours, a very serious infringement of a person's liberty. In *R.* v. *James*, *supra*, Judge Lilles set out an extensive list of consequences of s. 87, the most serious being, in my view, the lack of providing any hearing to determine if the person is in an intoxicated condition. Further, it does not provide an objective check by use of a breathalyzer test. Furthermore, a person detained under s. 87 is deprived of a civil remedy as long as the peace officer acts in good faith and without negligence. Thus, courts will be inclined to interpret the legislation with a view to ensuring that the rights and freedoms of individuals are not abused.

[24] The Crown submits that the trial judge erred in failing to consider the latter portion of the definition of intoxicated condition, that is, whether the person's capabilities are so impaired by liquor that she is likely to be a danger, nuisance or disturbance to others.

[25] The Crown submits, and I agree, that the definition of intoxicated condition suggests that a person will be found to be in an intoxicated condition where her capabilities are so impaired by alcohol that either:

1. she is likely to cause injury to herself; or
2. she is likely to be a danger, nuisance or disturbance to others.

[26] In my view, the definition of "intoxicated condition" clearly includes injury to the intoxicated person, as well as "a danger, nuisance or disturbance to others." That is to say that there is an expressed public purpose to prevent an intoxicated person from injuring herself, as well as preventing the intoxicated person from being a danger, nuisance or disturbance to others.

[27] There is no doubt that Judge Stuart did not use the words "nuisance" or "disturbance" in his analysis. He consistently referred to "injury to himself or another," "high risk of injury," or "danger to anyone."

[28] The trial judge did not say why he did not consider the "nuisance or disturbance to others" aspect of the definition. This may be explained by his implied acceptance of the reasoning in *R.* v. *James*, *supra*. In that case, Judge Lilles interpreted the words "nuisance" and "disturbance" as being *ejusdem generis* with "danger" and "injury." This means that Judge Lilles was applying the *ejusdem generis* rule of construction or, to use English terminology, what Ruth Sullivan refers to as the "limited class rule" in *Driedger on the Construction of Statutes*, 1994, at p. 203.

[29] The limited class rule was explained by the Supreme Court of Canada as follows:

> Whatever the particular document one is construing, when one finds a clause that sets out a list of specific words followed by a general term, it will normally be appropriate to limit the general term to the genus of the narrow enumeration that precedes it (*National Bank of Greece (Canada)* v. *Katsikonouris*, [1990] 2 S.C.R. 1029).

[30] In the words “danger, nuisance or disturbance” there is no general term that requires interpretation using the limited class rule. However, I agree with the view expressed in *R.* v. *James*, *supra*, that there must be some limitation placed on the words “nuisance” and “disturbance.”

Disturbance

[31] In *R.* v. *Lohnes*, [1992] 1 S.C.R. 167, McLachlin J., as she then was, provided a useful analysis of the word “disturbance” in the context of its use in s. 175 of the *Criminal Code*. She stated that the word has a broad range of meanings from the innocuous, in the sense of annoyance or emotional disruption, to the other end of the spectrum, which includes incidents of violence, inducing disquiet, fear and apprehension for physical safety (para. 7).

[32] Having considered the weight of the authorities, the principles of statutory construction and policy considerations, McLachlin J. concluded that disturbance must be interpreted as something more than annoyance or emotional disturbance. There must be an externally manifested disturbance of the public peace, in the sense of interference with the ordinary and customary use of the public place by the public and the disturbance must be one which may have been reasonably foreseen in the circumstances (para. 30).

<u>Nuisance</u>

[33] The word "nuisance" also has a broad range of meanings from a mere inconvenience or annoyance to actions that may cause personal injury or injury to property. As stated in Prosser and Keeton on the Law of Torts, s. 86, at 616 (W. Page Keeton, 5th ed., 1984):

> There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word "nuisance."

The Yukon Cases

[34] There is no doubt that the case authorities in this jurisdiction have favoured a very narrow interpretation of the definition of "intoxicated condition." This has been achieved by limiting the words "her capabilities are so impaired by liquor" to circumstances where she is likely to cause injury or danger to herself or others.

[35] In *R.* v. *James*, *supra*, Mr. James was observed to be staggering as he walked along the sidewalk. He had many of the signs of intoxication (odour of liquor, flushed face, glassy eyes and slow to answer), but was coherent in his answers. There was no singing, yelling or disturbance to others, but the police were concerned about his safety and the rush hour traffic.

[36] Judge Lilles found the usual indicia of impairment to be insufficient for the definition of intoxicated person and held it was an unlawful detention. Judge Lilles stated that the definition required intoxication that is likely to cause injury to himself or be a danger to others. However, he also addressed the meaning of the words "nuisance or disturbance to others" as follows, at page 9:

> In very narrow circumstances, however, the actions constituting the nuisance or disturbance might be so aggressive and provocative in

> nature that a physical assault by way of retaliation would probably result. Or the actions constituting the nuisance or disturbance are of such a negligent character that it is probable that a third party will be injured.

[37] In *R.* v. *Carlick*, *supra*, Judge Lilles found that Ms. Carlick was intoxicated to the extent she could not walk without assistance, and thus, she was lawfully taken into custody. The court stated that detention of intoxicated persons under the *Liquor Act* is not a criminal or quasi-criminal power, but reflects an attempt to deal with the state of intoxication and helping the person in that condition.

[38] In *R.* v. *McLeod*, [1992] Y.J. No. 34 (Y. Terr. Ct.), Judge Faulkner found reasonable and probable grounds for taking an intoxicated person into custody when she smelled strongly of alcohol and could not take a step without bracing herself against a wall. He adopted the principles of *R.* v. *Carlick*, *supra*.

[39] In *R.* v. *Hunter*, *supra*, Judge Faulkner found the definition of intoxication was met when Mr. Hunter smelled of alcohol, was staggering and swaying, and used his arm to support himself against a building. He agreed with *R.* v. *Carlick* that the person must be suffering from an extreme degree of intoxication (more than would be required for an impaired driving conviction) and that there be a likelihood of injury to the person or others. However, with respect to the test of reasonable and probable grounds he stated, at page 2, that:

> In my view, it does not need to be shown on a balance of probabilities that the requisite state of intoxication existed, rather it must be shown that the police officer had reasonable and probable grounds to believe it did. The difference is important. If a police officer sees a drunk weaving unsteadily along the banks of the Yukon River, the officer might reasonably think it likely the person could fall in. Proof, even to a civil standard, might require the officer to wait until the splash.

[40] Clearly, the case law in this jurisdiction required both extreme intoxication and likelihood of injury to the person or danger to others. The question in this case is the extent to which the "nuisance" or "disturbance" to others part of the definition must be considered. In the only case to refer to it, *R.* v. *James*, *supra*, Judge Lilles interpreted the words to require a "danger" or "injury" component. He allowed that situations where a disturbance was aggressive and provocative to the extent that a physical assault might result or where a nuisance was likely to cause injury to a third party would meet the definition.

[41] The difficulty with these definitions is that they result in only one test for "intoxicated condition." That is whether the intoxicated person is likely to cause injury to herself or cause injury to others. This interpretation ignores the words "likely to be a … nuisance or disturbance to others" in the definition. I have no difficulty with the view that a significant impairment of capability by liquor is required to find a person "likely to injure himself or herself." However, the description "extreme intoxication" is not appropriate as the test is whether the person's "capabilities are so impaired by liquor." Levels of intoxication will be highly variable as will the resulting impairment of capability.

[42] But in situations where the intoxicated person is a risk to herself, there is no risk to others and the impairment will often be significant before a person is likely to cause injury to themselves. However, I see no reason to import that interpretation where "others," i.e. the public, are involved. In the second part of the definition, the Legislature chose completely different words than the word "injury" used in the first part. While danger encompasses the prospect of injury, it is not limited by it. Neither danger nor injury is a necessary part of the words "nuisance" and "disturbance."

[43] The definition of disturbance under the *Criminal Code* is a good starting point. In *R.* v. *Lohnes*, *supra*, McLachlin J. stated: "There must be an externally manifested disturbance of the public peace, in the sense of interference with the ordinary and customary use of the premises by the public" (para. 30).

[44] In the context of the *Liquor Act* and public policy, there must be some tangible interference with the public's normal use and enjoyment of a public place. It is not enough to have a moment of singing or shouting or emotional nuisance or inconvenience. There must be some behaviour that is likely to continue to be a nuisance or disturbance as a result of the degree of intoxication. It must be the kind of disruptive conduct that is of a serious nature, inducing fear or apprehension for physical safety or a significant disruption of the normal and customary use of surrounding spaces.

ISSUE 2: Did the peace officer have reasonable and probable grounds to detain E.B.K. under s. 87 of the *Liquor Act*?

[45] Section 87 of the *Liquor Act* requires a peace officer to have "reasonable and probable grounds to believe and does believe that a person is in an intoxicated condition in a public place." A peace officer therefore requires a subjective belief in "the intoxicated condition" of the person to detain him or her. This subjective belief must also be objectively justified.

[46] In *R.* v. *Storrey*, [1990] 1 S.C.R. 241, Corey J. stated the following at para. 17:

> 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.

[47] The last sentence is very important. The decision of the peace officer to detain under s. 87 of the *Liquor Act* is not subject to an objective test of proof beyond a reasonable doubt. The issue is whether reasonable and probable grounds exist for the detention. In other words, the objective test does not mean that the circumstances of the detained person necessarily meet the definition of intoxicated condition by analysis after the fact. It was not argued before me that the test should be different for the *Liquor Act* because there is no trial to follow in most cases of detention under this *Act*.

[48] Rather, the case law states (in the case of an impaired driving charge in *R.* v. *McClelland*, [1995] A.J. No. 539 (Alta. C.A.)) that the role of the court in determining the objective test is not to hold an impaired driving trial, but to determine from an objective standpoint on the totality of the evidence whether the officer had reasonable and probable grounds to believe that the ability of the driver was impaired by alcohol.

[49] In applying this reasonable and probable grounds test to s. 87 of the *Liquor Act*, the peace officer must have reasonable and probable grounds that a person is in an intoxicated condition. In other words, were her capabilities so impaired by liquor that she was "likely" to injure herself or be a danger, nuisance or disturbance to others?

[50] The peace officer does not need to prove that E.B.K. would cause injury to herself or be a danger, nuisance or disturbance to others. However, he must demonstrate that a reasonable person placed in his position would conclude that there were reasonable and probable grounds that E.B.K. would likely cause injury to herself or be a danger, nuisance or disturbance to others.

[51] Taken in this light, it is not appropriate to second-guess Cpl. Cashen's evidence, as the trial judge did, at paragraphs 9 and 10, of his judgment:

> There was no evidence to establish what opportunity Corporal Cashin [*sic*] had to observe whether the accused did look to see if traffic was coming. Was the Corporal close or far away? Did the Corporal observe the accused from the side, back or front?
>
> At the time, the visibility was clear. Nothing obstructed the accused's view of the road. No traffic was in the area, and it was not dark. The evidence did not establish that the accused failed to look.

[52] Again, at paragraph 29, the trial judge observed:

> The evidence does not reveal what opportunity the officer had to determine if the accused did fail to look for traffic.

[53] The evidence of Cpl. Cashen on this point was the following:

> I was patrolling down 4th Avenue, in the direction of the Robert Service Way highway, and I observed E.K. as she came out from the back entrance to her residence. She began to head towards the direction of the Robert Service Way Highway. At that point in time, I made eye contact with E.K., who was looking at the marked police car. As I turned to go down Jeckell, I watched as E.K. began to run across the Robert Service Way highway. It's my observation that she failed to look in either direction, that she ran across the highway and into the park on the other side.

[54] This evidence should not be considered from the point of view that Cpl. Cashen must establish beyond a reasonable doubt that E.B.K. did not look as she crossed the highway. Cpl. Cashen made an observation that forms part of the totality of the evidence as to whether he had reasonable and probable grounds to believe that E.B.K. was in an intoxicated condition.

The Subjective Test

[55] Although the trial judge did not explicitly deal with the subjective test, I am of the view that the peace officer had the subjective reasonable and probable grounds. He formed the opinion that E.B.K. was intoxicated and that she was a danger to herself for running across a highway, on his evidence, without looking.

[56] He also had subjective reasonable and probable grounds on the second arm of the definition, in that she was likely to be a disturbance to others, based upon her reported screaming in the first incident and his observation of her yelling and screaming with S.R. on the second incident. Hearsay is admissible to establish reasonable and probable grounds. I now will consider the objective test on both arms of the definition of intoxicated condition.

The Objective Test

Injury to Herself

[57] As to whether she was likely to cause injury to herself from an objective point of view, I agree with the trial judge that the evidence was that there was no traffic, nothing obstructed the view of oncoming traffic, and it was not dark. Even with the evidence that she did not look, I conclude that she was not likely to injure herself. There was no evidence from the previous incidents that she was likely to injure herself.

A Danger, Nuisance or Disturbance to Others

[58] I now turn to the second part of the test. Viewed objectively, would a reasonable person conclude that E.B.K. was likely to be a nuisance or disturbance to others?

[59] On the first incident, Cpl. Cashen clearly concluded that despite being moderately intoxicated, the reported disturbance in the form of yelling and fighting, was no longer evident on his arrival. E.B.K. and S.R. were capable of speaking intelligibly and complied with his request to get in the back seat of the police cruiser. He wisely released them to go on their way home and cautioned them to keep the noise down.

[60] The second incident was a complaint of fighting, in the same general neighbourhood, with an escalation of the nuisance or disturbance aspect as Cpl. Cashen heard the yelling and screaming back and forth between E.B.K. and S.R., who was some distance away at this point. Once again, Cpl. Cashen performed good police work by cautioning E.B.K. that she was underage and intoxicated and that if she failed to go home, he would arrest her.

[61] On the third incident, one can appreciate the dilemma that Cpl. Cashen was in. He had warned her that she would be arrested if she did not go home. E.B.K. had now clearly left her home at 4:40 a.m., and he observed her running across a highway. Although he did not see S.R. until after the arrest, he concluded that there was a threat of additional disturbances. She was a youth, engaged in underage drinking, out at 4:30 in the morning, and moderately intoxicated. She had been cautioned twice before as a result of calls to the police about a disturbance. It was reasonable for Cpl. Cashen to conclude that the disturbance would likely occur again.

[62] There is no requirement under the objective test that E.B.K. was actually a disturbance to others at the time of her detention. There is a requirement that Cpl. Cashen have reasonable and probable grounds to believe that she would be likely to be a disturbance. Based upon the totality of the evidence that evening, he had reasonable

and probable grounds to detain her under s. 87 of the *Liquor Act*. It was not a mere nuisance or emotional disturbance on the first two occasions. Disturbance calls were made to the police by members of the public and Cpl. Cashen observed the seriousness of the disturbance on the second occasion. The incidents could reasonably be perceived as escalating.

[63] I note that the Crown's submission appears to have been that the totality concept would encompass both parts of the definition taken together to form the reasonable and probable grounds. I do not agree. Each part of the definition must be construed separately. It cannot be the case that you would meet one-half of the test under each part and thus, "bootstrap" a finding that the conduct met the definition. Each part of the test in the definition must be considered separately, although some of the evidence for each part may be the same. The tests are different.

ISSUE 3: To what extent is a peace officer required to seek someone to take care of an intoxicated person before taking such a person into custody under s. 87 of the *Liquor Act*?

[64] Section 87 states that a person shall be released if there are reasonable and probable grounds to believe that a capable person will undertake the care of a detained person.

[65] The trial judge has concluded that before detaining anyone, the police must be diligent in seeking someone to take care of the intoxicated person. He decided that this was a precondition to exercising the power to detain. There is no statutory requirement for such an obligation. In my view, the trial judge was implying such an obligation from the wording of s. 87(2)(b), which clearly creates a duty to release a person from detention if the peace officer knows that a person capable of taking care of the

intoxicated person is available and willing. It is not unreasonable that a peace officer should consider whether there is such a person available before detention. But the more difficult question is how far the peace officer must go to meet this implied obligation. If the peace officer is dealing with an intoxicated adult, the issue should only be, pre-detention, whether there is a person in the immediate vicinity to care for the person.

[66] There is a slightly higher obligation with a youth, as s. 87(4) of the *Liquor Act* requires that where a minor is taken into custody, the peace officer "shall, as soon as practicable, make reasonable efforts to notify the minor's parents," presumably so that the minor's parents may assume custody of the minor. Once again, this obligation is post-detention. Thus, a peace officer should avoid the detention process where a parent is readily available. However, there is no statutory obligation for a peace officer to make inquiries or attempt to place her in the care of someone willing and able to remove any perceived risk. In this case, where Cpl. Cashen was in the act of chasing E.B.K. to make an arrest, such an obligation does not arise.

[67] It is good police work to be reasonable and act with moderation and responsibility, as stated by Hinds J. in *Besse* v. *Thom* (1979), 96 D.L.R. (3d) 657 (B.C. Co. Ct.). In my view, Cpl. Cashen did exactly that in the early morning hours of June 14, 2002 when he twice cautioned E.B.K., and on the second occasion told her to go home and watched her go into her residence.

[68] Is there a further obligation to take E.B.K. to the doorstep of her residence and speak to her parents? The Legislature didn't think so and, in my view, it would be an onerous obligation to impose on a peace officer, particularly when there is no statutory wording upon which to base such an obligation.

[69] On the other hand, no peace officer should be heavy-handed and immediately conclude that detention is necessary for the slightest provocation, particularly with youth. But on the facts of this case, on the third occasion, the peace officer had reasonable and probable grounds to detain E.B.K. under the *Liquor Act*. He should not be required to provide the alternative of taking her home when he is chasing her to prevent a further disturbance.

[70] The obligation to notify her parents obviously arises during her detention "as soon as practicable." There has been no submission by counsel and no finding by the trial judge that this obligation was not met.

DECISION

[71] The test for review of a trial judgment is well-canvassed in the case of *R.* v. *R.W.* (1992), 74 C.C.C. (3d) 134 (S.C.C.), where McLachlin J., as she then was, set out the standard for review under s. 686(1)(a)(i) of the *Criminal Code*. In that case, the question was whether a Court of Appeal could also review verdicts based on findings of credibility, as well as law. McLachlin J., in concluding that it could, stated at page 141:

> The test remains the same: could a jury or judge properly instructed and acting reasonably have convicted? That said, in applying the test the Court of Appeal should show great deference to findings of credibility made at trial. This court has repeatedly affirmed the importance of taking into account the special position of the trier of fact on matters of credibility: *White* v. *The King* (1947), 89 C.C.C. 148 at p. 151, [1947] S.C.R. 268, 3 C.R. 232; *R.* v. *M.(S.H.)* (1989), 50 C.C.C. (3d) 503 at pp. 548-9, [1989] 2 S.C.R. 446, 71 C.R. (3d) 257. The trial judge has the advantage, denied to the appellate court, of seeing and hearing the evidence of witnesses. However, as a matter of law it remains open to an appellate court to overturn a verdict based on findings of credibility where, after considering all the evidence and having due regard to the advantages afforded to the trial judge, it concludes that the verdict is unreasonable.

In my view, this is the test for a court of appeal in this matter.

[72] The first question is whether the trial judge properly instructed himself as to the definition of "intoxicated condition."

[73] In my view, the trial judge failed to address the second part of the definition of "intoxicated condition." When referring to the definition, he used the words "injury to himself or another," and "a high risk of injury" and "danger to anyone." This interpretation ignores the words "nuisance or disturbance to others," which I have interpreted above. I find this to be a reversible error.

[74] I have found that the trial judge also erred in not considering the totality of the evidence under the second part of the definition, i.e. was E.B.K. likely to be a nuisance or disturbance to others? The trial judge required the peace officer to "establish" that E.B.K. ran across the highway without looking. In my view, the peace officer does not have to establish that fact in the manner required by the trial judge.

[75] I have also found that it was an error to impose an obligation on the peace officer to find a safe alternative before detention in the circumstances of this case.

[76] As a result, I find that E.B.K. was lawfully detained under s. 87 of the *Liquor Act*. Thus, she is guilty of assaulting a peace officer with intent to resist arrest, contrary to s. 270(1)(b) of the *Criminal Code*. As there is no evidence or submission before me, I direct that the matter be referred back to the trial court for sentencing. The charge of resisting a peace officer in the execution of his duty under s. 129(a) of the *Criminal Code* is conditionally stayed.

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VEALE J.