IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Barbara M. Hamilton
Madam Justice Jennifer A. Pfuetzner
Madam Justice Karen I. Simonsen

B E T W E E N :

HER MAJESTY THE QUEEN	)	***R. I. Histed***
	)	*for the Appellant*
	)	
(Respondent) Respondent	)	***N. M. Cutler***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard:*
PATRICK SHAMUS CULLIGAN	)	***January 11, 2019***
	)	
	)	*Judgment delivered:*
(Accused) (Appellant) Appellant	)	***April 1, 2019***

SIMONSEN JA

[1] Following a trial in the Provincial Court, the accused was convicted of the summary conviction offences of possession of cocaine, resisting a peace officer and failing to comply with an undertaking by failing to keep the peace. A summary conviction appeal judge (the appeal judge) dismissed his conviction appeal. Leave to appeal to this Court was granted, under section 839(1) of the *Criminal Code* (the *Code*), on the following ground:

> The appeal judge erred in law in upholding the finding of the trial judge that the arrest or detention of the accused was lawful on the basis that the issue was not raised at trial (see *R v Culligan*, 2018 MBCA 60)

[2] The Crown concedes that the appeal judge so erred, but asserts that the appeal should be dismissed because the accused was not unlawfully detained or arrested.

Background

[3] One of the grounds of appeal before the appeal judge was that the trial judge had erred in concluding that the arrest of the accused for disorderly conduct under section 120(5) of *The Liquor Control Act*, CCSM c L160 (now *The Liquor, Gaming and Cannabis Control Act*, CCSM c L153) was lawful. The accused took the position that the arrest was unlawful and that because the convictions turned on the legality of the arrest, acquittals should be entered on all counts.

[4] The appeal judge characterised the "main focus" of the accused's appeal regarding the legality of his arrest for disorderly conduct as being that the arrest was preceded by an unlawful detention. The accused argued that his response to the unlawful detention could not be used to justify his arrest. The appeal judge concluded that the issue of whether there had been an unlawful detention had not been raised at trial and did not meet the test for being entertained for the first time on appeal (see *R v McPhee*, 2004 MBCA 43). Therefore, she held that there was no basis for appellate intervention on the issue of whether the arrest was lawful.

[5] As noted by the judge of this Court who granted leave to appeal (see para 28), defence counsel had in fact asserted during the trial that the arrest of the accused was unlawful because of a prior unlawful detention. As such, the Crown appropriately concedes that the appeal judge's decision to uphold the

trial judge's conclusion that the arrest was lawful was based on an erroneous understanding.

[6] To avoid delay and in the interests of judicial economy, both Crown and defence counsel requested that this Court decide the issue that the appeal judge declined to address, rather than referring it back to the summary conviction appeal court. Counsel agree that the facts as found by the trial judge are sufficient to allow us to determine the issue that was before the appeal judge but not decided by her; that is, whether the arrest was rendered unlawful because of a prior unlawful detention. I agree.

The Facts

[7] The facts of the incident that led to the charges of which the accused has been convicted were summarised by the trial judge in his reasons as follows:

> The Crown's case against [the accused] is summarized as follows. On January 12th, 2014 Constable Norman was on duty working in plainclothes capacity with a partner to enforce the provisions of The Liquor Control and Gaming Act at Teasers Bar in Winnipeg.
>
> Constable Norman entered the bar and saw [the accused] standing in the bar with other people. Constable Norman believed he recognized [the accused] from previous dealings. Constable Norman received prior information that [the accused] was pending on criminal charge and on release with conditions.
>
> Mr. Norman requested – – or Constable Norman rather, requested that two supporting uniform officers enter the bar and spot check [the accused] to confirm his identity and determine if he was breach[ing] any of its release conditions.
>
> When requested to produce identification [the accused] failed to comply and quickly became verbally aggressive and failed to

> respond to directions to calm down. Shortly thereafter [the accused] moved to approach Constable Norman and uniform officers physically restrained him fearing for the physical safety of Constable Norman.
>
> The accused was detained [by Constable Norman] for causing a disturbance in a licensed premise pursuant to the provisions of The Liquor and Gaming Control Act.

[8] The accused was then immediately arrested and handcuffed by Constable Norman. Constable Chymyshyn (one of the two officers who approached the accused and the one who asked for his identification, at Cst. Norman's request) was required to assist because the accused was uncooperative. Following the arrest, there was a scuffle outside in which the accused attempted to head-butt Cst. Chymyshyn; that led to the charge of resisting a peace officer. The accused was searched and the police found 12 pieces of crack cocaine in his pocket; this led to the charge of possession of cocaine. Because the accused was subject to a court order to keep the peace, he was charged with breaching that provision.

Position of the Accused

[9] At trial, the accused did not file a motion under section 24(2) of the *Canadian Charter of Rights and Freedoms* (the *Charter*) seeking exclusion of the cocaine. His counsel indicates that such a motion was not brought because it would have been incongruous with the accused's position that the evidence of cocaine in his pocket was fabricated as a result of Cst. Norman's animus toward him due to their previous contacts.

[10] The essence of the accused's argument on this appeal (and before the appeal judge) is that his arrest was unlawful because it was preceded by an unlawful detention.

[11] More specifically, my understanding of the accused's position is that the police detained him when they approached him for his identification, and that this detention was unlawful because they had no grounds to suspect him of any crime (see *R v Pinto*, 2003 CarswellOnt 5097 at para 64 (Sup Ct J)). He says that, in these circumstances, the police exceeded their powers at common law as prescribed in the English decision of *R v Waterfield*, [1963] 3 All ER 659 (Ct Crim App), adopted in *Dedman v The Queen*, [1985] 2 SCR 2, and did not comply with section 9 of the *Charter* which protects against arbitrary detention. He also says that the detention was unlawful because the police did not advise him of the reason for his detention or of his right to counsel, as required by section 10 of the *Charter*. The accused also relies on common law authority which provides that, upon arrest, a person must be advised of the reason for the arrest (see *Christie v Leachinsky*, [1947] AC 573 at pp 587-88). He argues that, because the police were not acting in the lawful execution of their duty in detaining him, he was entitled to resist the detention and that he did so in a proportionate manner such that his conduct did not constitute reasonable grounds for arrest.

[12] Fundamentally, the accused argues that the police cannot create, through an unlawful detention, circumstances said to justify a further intrusion into his liberty interests (see *R v McGuffie*, 2016 ONCA 365 at paras 54-56).

[13] The accused adds that the trial judge also erred in concluding that the arrest was lawful because both the police officers and the trial judge

misunderstood the meaning of disorderly conduct under *The Liquor Control Act* (as it then was) and confused it with the criteria for the offence of causing a disturbance under section 175(1)(a) of the *Code*. I note that the trial judge acquitted the accused of disorderly conduct because he was not satisfied beyond a reasonable doubt, on the evidence before him, that the bar where the incident occurred was "licensed premises" at the material time. He was, however, satisfied that the arresting officer had reasonable grounds to believe that the bar was licensed.

[14] In the accused's submission, it follows from his arrest being unlawful that acquittals should be entered on all counts. With respect to the charge of resisting a peace officer, he says that he was entitled to resist an unlawful arrest. He relies on authorities which have held that, in respect of the offence of assaulting a peace officer engaged in the execution of his or her duty, there can be no conviction where the peace officer undertakes an unlawful arrest as the officer is not then acting in the execution of duty (see *Pinto* at para 41). With respect to the conviction for possession of cocaine, the accused contends that even without a motion for exclusion of the evidence of the drugs, the trial judge should have excluded that evidence because the cocaine was found on a search conducted incidental to an unlawful arrest. Regardless, the accused argues that, because of the unlawful arrest, an acquittal should be entered on the count of possession of cocaine in the interests of justice. Or, in the alternative, a new trial should be ordered on that count alone.

Position of the Crown

[15] The Crown maintains that the trial judge did not err in concluding that the arrest of the accused was lawful.

[16] Crown counsel acknowledges that it would have been preferable for the police officers to have dealt with the situation differently than they did. Both Csts. Norman and Chymyshyn testified that they could have checked on their computer system for the accused's conditions, without approaching and speaking with him. Nonetheless, the Crown says that the police conduct was not unlawful.

[17] The Crown asserts that the accused was not detained when the police approached him for his identification. Furthermore, even if he was unlawfully detained, his response, on the facts found by the trial judge, was so disproportionate that any negation of the police acting in the lawful execution of duty had ended and there were reasonable grounds for his subsequent arrest (see, e.g., *R v Barrow*, 2011 ONCJ 239). With a lawful arrest, there is no basis to exclude the cocaine and the accused was properly convicted of resisting a peace officer as a consequence of his post-arrest conduct.

[18] The Crown further submits that, even if the arrest was unlawful, the cocaine cannot be excluded in the absence of a motion for exclusion under section 24(2) of the *Charter*.

Discussion and Decision

[19] First, there is no merit to the accused's argument that the trial judge erred in concluding that the arrest was lawful because both the police officers

and the trial judge confused the offence of disorderly conduct with the offence of "causing a disturbance". There was clearly evidence upon which the trial judge could have found that Cst. Norman understood the criteria for the offence of disorderly conduct. Furthermore, I am satisfied from the trial judge's reasons as a whole that he simply misspoke when he said "causing a disturbance" and that he understood and applied the correct meaning of "disorderly conduct" when he concluded that there were reasonable grounds for the accused's arrest.

[20] In my view, this appeal can be resolved by answering the question of whether the accused was detained when he was first approached by the police. Whether there was a detention will depend on all of the circumstances of the case. On this issue, application of the law to the facts is a question of law (see *R v Grant*, 2009 SCC 32 at para 43).

[21] Despite the accused's focus on the common law, both counsel acknowledge that *Charter* jurisprudence regarding the definition of "detention" is instructive as the use of police power to conduct investigative detentions under the *Charter* is consistent with the police power to detain as enunciated in *Waterfield/Dedman* (see *R v Mann*, 2004 SCC 52 at para 34).

[22] The Supreme Court of Canada in *Grant* defined "detention" for the purpose of sections 9 and 10 of the *Charter* as follows (at para 44):

> In summary, we conclude as follows:
>
> 1. Detention under ss. 9 and 10 of the *Charter* refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the

> restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.
>
> 2. In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, *inter alia*, the following factors:
>
> (a) The circumstances giving rise to the encounter as they would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.
>
> (b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.
>
> (c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

[23] As further stated in *Grant*, quoting *Mann*, it is not any fleeting or slight interference by the police that will constitute a detention (at para 26):

> The second interpretation of "detention", reducing it to any interference, however slight, must also be rejected. As held in *Mann*, at para. 19, *per* Iacobucci J.:
>
> > . . . the police cannot be said to "detain", within the meaning of ss. 9 and 10 of the *Charter*, every suspect they stop for purposes of identification, or even interview. The person who is stopped will in all cases be "detained" in the sense of "delayed", or "kept waiting". But the constitutional rights recognized by ss. 9 and

> 10 of the *Charter* are not engaged by delays that involve no significant physical or psychological restraint.
>
> It is clear that, while the forms of interference s. 9 guards against are broadly defined to include interferences with both physical and mental liberty, not every trivial or insignificant interference with this liberty attracts *Charter* scrutiny. To interpret detention this broadly would trivialize the applicable *Charter* rights and overshoot their purpose. Only the individual whose liberty is meaningfully constrained has genuine need of the additional rights accorded by the *Charter* to people in that situation.

[24] As for whether there was a physical detention in this case, the trial judge's reasons indicate that he accepted the evidence of the police officers. Constable Chymyshyn testified that the accused was not physically restrained when he was approached for his identification, but only after he began to move toward Cst. Norman. At that point, Cst. Chymyshyn grabbed his arm. Therefore, the trial judge's findings do not support a conclusion that there was a physical detention at the outset.

[25] In terms of whether there was a psychological detention, the trial judge's findings as to what occurred immediately after the police officers approached the accused are important. He stated:

> I do not accept that the Crown evidence merely demonstrates that [the accused] used foul language. In the colourful description of Constable Chymyshyn, [the accused] "went from zero to pissed off in two seconds." He commenced swearing and refused to calm down when directed to do so. When Constable Chymyshyn asked for identification [the accused] proceeded to walk towards Constable Norman pointing at him and yelling: "Ask the fucking narc." In the circumstances disclosing the identity of a plainclothes officer inside a crowed gar -- bar could potentially place the officer at risk. In the context the comment which was yelled, could reasonably be viewed as a call to arms for the crowd against the officer. Given the volatile temper exhibited coupled

> with the comment and the fact that [the accused] was advancing on Constable Norman, the court is satisfied that the objective reasonable grounds existed to believe that [the accused] was causing a disturbance as commonly defined.

[26] The accused does not suggest that a psychological detention was created as a result of him having a legal obligation to comply with the request for his identification. Rather, he argues that, by reason of the police conduct, a reasonable person in his circumstances would have considered that he had no choice but to comply with the police request.

[27] The accused contends that the police officers' evidence, which was accepted by the trial judge, supports the conclusion that there was a detention. He says that the police officers testified that they intended to, and believed that they did, detain him when they approached him and asked for his identification. The Crown characterises their evidence somewhat differently and says that they testified that they intended to detain the accused if he did not agree to produce the identification. Regardless, and even if the police officers intended to detain the accused at the outset, that is not determinative. There was no evidence or finding by the trial judge that the police officers told the accused of their intention to detain him, and their non-communicated thoughts are of little relevance in a detainee-centred objective analysis. It is only when those intentions are communicated by conduct that they become relevant (see *R v Koczab (A)*, 2013 MBCA 43 at para 37).

[28] The trial judge found that the accused was not cooperative when he was asked for his identification. Instead, he became belligerent, did not produce the identification and moved toward Cst. Norman. None of this indicates that he believed he was deprived of the liberty of choice. Rather, he

made choices to not cooperate and to move away. On these facts, a reasonable person in the accused's circumstances would not have concluded that he was deprived by the state of the liberty of choice to comply with the police request. The police simply approached him and asked for his identification; the jurisprudence makes clear that this kind of limited interaction does not necessarily create a detention. In all of the circumstances, there was, at law, no detention for *Charter* purposes. Nor was there any prima facie interference with the accused's liberty interests which is required, preliminarily, to even engage an inquiry under *Waterfield/Dedman*.

[29] For the foregoing reasons, there was no basis for the appeal judge to interfere with the trial judge's conclusion that the accused's arrest was lawful. Although she erred at law, as noted above, her decision did not result in a substantial wrong or a miscarriage of justice.

[30] In the result, I would dismiss this appeal.

Simonsen JA

I agree: Hamilton JA

I agree: Pfuetzner JA