
CANADA / JUDGMENT

R. v. Bhabha

2016 BCSC 993

COURT

Supreme Court of British Columbia

DECIDED

3 June 2016

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2016 BCSC 993 R. v. Bhabha

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Bhabha,

2016 BCSC 993

Date: 20160603

Docket: 26921

Registry: Vancouver

Between:

Regina

v.

Ismail Bhabha

Before: The Honourable Associate Chief Justice Cullen

Reasons for Judgment

Counsel for the Crown:

N. Reithmeier

Counsel for the Appellant:

M.K. Woodall

Place and Date of Hearing:

Vancouver, B.C.

March 2, 2016

Place and Date of Judgment:

Vancouver, B.C.

June 3, 2016

- [1] This is an appeal from a conviction for assault arising from events which took place on March 26, 2013 at approximately 10:40 p.m.
- [2] The appellant is a police officer. The complainant was a bicyclist who was being dealt with by the appellant for several alleged infractions of the Motor Vehicle Act; riding a bicycle through a red light, riding a bicycle after dusk without lights, and, riding a bicycle without a helmet.
- [3] At the time of the alleged infractions, the appellant was with another officer, Cst. Yaremy, in their police vehicle. After the complainant was stopped by the officers, the appellant got out of the vehicle to deal with him while Cst. Yaremy initially stayed in the vehicle. In response to a request for identification, the complainant claimed, inaccurately, that he had no identification with him but he gave what turned out to be his correct name and date of birth to the appellant. He may have also given his address although the trial judge found "that was not clear".
- [4] Both the appellant and Cst. Yaremy described the complainant's behaviour as "dismissive, argumentative, emotional and confrontation-seeking" from the outset. The appellant and the complainant were initially standing on Beatty Street where the stop took place. The appellant asked the complainant to move off the travelled portion of the roadway and onto the sidewalk. The complainant complied with that request. The appellant testified that he then asked the complainant to make room for him on the sidewalk on a number of occasions but the complainant refused. The trial judge did not accept that aspect of the appellant's evidence.
- [5] As the appellant was dealing with the complainant, Cst. Yaremy was in the vehicle using the onboard computer to verify the complainant's identity. At some point, an acquaintance of the complainant who was driving by, stopped and got out of his vehicle to approach the encounter. According to the witness, the complainant was "surrounded by two plain-clothes police officers" and "they were in a very confrontational position with each other". The witness testified that things were "very hostile" and he felt things could escalate, although he did not say at whose instance. He described a lot of arguing between the appellant and complainant and characterized the conversation as escalating to the tipping point.
- [6] He described the complainant as rude, but not physically confrontational. He said at one point the complainant swore at the appellant and the complainant turned around and the appellant began handcuffing him at which point the complainant said that's "fucking bullshit".

[7] The witness then recorded what ensued on his cell phone which captured the appellant punching the complainant in the head. The appellant testified he punched the complainant because he was resisting being handcuffed and the appellant feared for his safety and that of his fellow officer.

[8] The judge noted that the appellant relied on s. 25(1) of the Criminal Code as a defence and quoted from that section as follows:

Every one who is required or authorized by law to do anything in the administration or enforcement of the law

(b) as a peace officer or public officer

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

[9] The trial judge observed that if there is a reasonable doubt about the applicability of this defence to a defendant, he must be acquitted. He went on to state as follows:

That I base my verdict upon the assumption that most of what I was told about these events by the defendant and Cst. Yaremy was true and, where there is a difference between them and the complainant, I give the benefit of the doubt to the defendant.

[10] The judge went on to note that there was one exception to his acceptance of Cst. Bhabha's evidence over that of the complainant, and that was his evidence that the complainant refused to move back onto the sidewalk to allow the complainant to get up onto it after the complainant had gone up on to it at the appellant's command.

[11] The judge held:

I do not believe this and reject it as untrue. Only the defendant described this exchange. The complainant denied it and both Swartz [the passing motorist] and Cst. Yaremy did not testify to seeing it or hearing it. Finally it just did not strike me as a believable part of the defendant's testimony and I do not believe it.

[12] The judge observed that much of the testimony and argument that he heard dealt with the punch and whether the appellant was acting on "reasonable grounds" and whether he used "as much force as was necessary" in punching the complainant.

[13] The judge, however, determined the case, not on that ground, but on the ground that the appellant was not acting in a manner "required or authorized by law" in placing the handcuffs on the complainant. As a result, he concluded that "even if the complainant was resisting being handcuffed, as the cuffing was unlawful, his resistance to it would not excuse the defendant's assault of punch, which was said to be intended to end that resistance."

[14] The essence of the judge's reasoning was that despite the appellant's and Cst. Yaremy's description of the complainant as "aggressive", "emotional", "argumentative" and, "getting angry", he found "no evidence of an objectively observable reason for the defendant to

believe the complainant was a threat to anyone's safety." He noted the complainant "did not use threatening words, did not make threatening gestures, did not move toward the defendant or his partner in a threatening fashion". He was compliant, albeit "he was albeit compliant reluctantly".

- [15] The judge found that the handcuffing of the complainant amounted to a "de facto arrest". He referred to a submission or "suggestion" that the arrest was "justified" by the provisions of s. 495(2)(d)(i) which conditionally approve of an arrest to "establish the identity of the person". He concluded, however, "that that was not the reason for handcuffing the complainant, testified to by the defendant" and does not justify an arrest "simply because someone seemed to have committed a provincial offence on a bicycle does not have documentary proof of identity."
- [16] The judge distinguished *R. v. Moore*, [1979] 1 S.C.R. 195 in which the Supreme Court of Canada held that a refusal to provide identification to a peace officer, who had witnessed the appellant cyclist commit a Motor Vehicle Act offence justified an arrest in accordance with s. 450(2) (now 495(2)) of the Code "only if it were necessary to establish his identity".
- [17] The judge held in the present case unlike in *Moore*, "The complainant did identify himself and unless there was reason to believe he did so falsely his failure to provide identity papers, irrespective if he had them, did not justify a handcuff arrest."
- [18] The judge went on to observe that "in any event" the appellant's decision to handcuff the complainant was motivated by "concerns for his own safety and in order to facilitate his giving the complainant a ticket for the red light infraction". He then proceeded to his analysis of the objective basis for the appellant's expressed belief that the complainant "had the potential to be a real threat to my safety and wanted [him] to be in handcuffs so we could continue with the traffic stop and get it over as quickly as possible."
- [19] In his concluding paragraph (para. 30), after finding "no objectively discernible reason for the defendant to believe the complainant was a threat to anyone's safety", the judge held as follows:

Therefore the initial condition precedent for the application of s. 25 defence has not been met. As I said earlier, I am arriving at this conclusion by applying the standard of proof beyond a reasonable doubt. Because that is the only defence raised or available on the evidence before me I find the defendant guilty as charged.

THE APPELLANT'S POSITION

- [20] In his Notice of Appeal, the appellant advanced the following grounds in support of an order overturning the finding of guilt and entering an acquittal:
1. The learned judge erred by finding that the appellant did not have lawful grounds to arrest or detain the complainant.

2. The learned judge erred by finding that the appellant did not have lawful grounds to place handcuffs on the appellant during arrest or detention.
 3. The learned judge erred by finding that the appellant did not have lawful grounds to apply necessary force to place the appellant in handcuffs to complete the arrest or detention and to ensure officers' safety while so doing.
- [21] In oral submissions, counsel for the appellant distilled the grounds of appeal into the question whether the appellant's application of handcuffs turned a lawful detention into an unlawful detention.
- [22] The appellant argued that the judge misapprehended the issue of the appellant's right to arrest the complainant using handcuffs. It was not as the judge stated because the complainant produced no documentary ID; the original right to arrest or detain arose from the need to confirm the complainant's identity; the further right to use handcuffs while confirming the complainant's identity arose from the need to prevent the complainant from endangering the officer's safety. Even though the complainant supplied information concerning his identity, the police had an ongoing duty to confirm its validity and while that confirmation process was underway, if the complainant's conduct objectively justified the use of handcuffs, then what ensued was justified by s. 25.
- [23] The appellant accepted the proposition that when a person is stopped for an alleged traffic violation, there must be a basis to believe that an issue of officer's safety is engaged before applying handcuffs. The appellant argued, however, that the trial judge fell into error by holding the "legal point" at which that issue is engaged is only when the person stopped actually threatens the officer by word or deed as opposed to there being a basis to believe that the person's behaviour may escalate into violence or threats of violence. The appellant submitted that there is no need for an officer in such circumstances to wait for an imminent threat. The appellant contended that if the evidence objectively supports a conclusion that the situation could develop into imminent danger, the officer is able to take steps to ensure officer's safety. The appellant submitted that the trial judge accepted the appellant's evidence where it conflicted with the complainant except where the appellant testified he asked the complainant a number of times to move to permit him to stand on the sidewalk and the complainant refused. The appellant contended that the judge's partial reliance on the absence of supporting evidence from Cst. Yaremy and Mr. Swartz may undermine that finding as Swartz was not on the scene at the time that was alleged to have taken place and Cst. Yaremy was still in the police vehicle. Nevertheless, whether the judge's finding on that point is sustainable or not, the appellant submitted that the arrival of Mr. Swartz turned the encounter into something more serious. The appellant submitted that it is sufficient if there is a basis to see a risk evolving, there is no need to wait for an actual confrontation. The appellant referred to the evidence of two experts called at the trial who agreed use of handcuffs to calm someone down who is escalating towards physical violence is appropriate.

- [24] The appellant characterized the trial judge's error as applying the wrong test, by requiring evidence of the actual utterance of a threat or a threatening gesture. The appellant conceded there is no evidence of an actual threat or gesture in the present circumstances, but the evidence supports, objectively, that the complainant represented a threat to officer safety justifying the use of handcuffs while it was necessary to detain him pending a determination of his identity.
- [25] The appellant submitted the application of handcuffs is a minimal use of force and that was a reasonable basis to believe that it was necessary for officer safety. He submitted there was a lawful detention to determine the complainant's identification; the handcuffing was warranted because of the complainant's escalating hostility and the blow was justified to prevent his resistance to the handcuffing. The appellant submitted the question is whether the perception of a threat was reasonable and given the judge's acceptance of the evidence that there was hostility and confrontation which was reaching the tipping point, there is a basis to conclude that it was. The judge's reliance on the need of an actual or imminent threat is too high a threshold.
- [26] Counsel for the appellant submitted that in light of the trial judge's findings favouring the evidence of the appellant, including the evidence that the complainant was resisting being handcuffed, there should be an acquittal rather than a new trial.

THE POSITION OF THE CROWN

- [27] The Crown did not take issue with the evidence relied on by the appellant, but noted that much of what the trial focused on was the reasonableness, in the circumstances, of the punch. The court in its decision "went down a less highlighted path and focused not on the punch but on the use of handcuffs, finding that their use not to be objectively justifiable and therefore not justified in law". The Crown submitted the only issue is whether the judge was right or wrong in his conclusion.
- [28] The Crown acknowledged that the appellant's argument about the reasonableness of the judge's finding that the complainant did not comply with the appellant's request to move to allow him onto the sidewalk, was, in part, based on a misapprehension of the evidence by the trial judge. The Crown agreed that Mr. Swartz, the witness, did not arrive on the scene until after the appellant testified that that incident had happened and hence his silence on the subject would not be probative of the truth of that evidence. The Crown submits, however, that was not an overriding error as the judge based his findings on that point on other evidence including that of the complainant and the fact that Cst. Yaremy did not testify to hearing or seeing that exchange, although not being entirely focused on it.
- [29] The Crown submitted the trial judge was entitled to reject that evidence even if he misapprehended the importance of the absence of corroborative evidence of Swartz or Yaremy.

- [30] The Crown submitted, essentially, that the judge's conclusion about the applicability of s. 25 rests on his findings of fact and that he made no palpable and overriding errors in his assessment of the evidence or findings of fact.
- [31] The Crown submitted the issue raised on appeal with respect to the judge's treatment of the right to arrest for a failure to provide identification is a "red herring". The real issue is the judge's finding that there was no objectively discernible basis for the appellant's professed belief that protecting officer safety required him to handcuff the complainant.
- [32] The Crown submitted even if the judge committed an error necessitating a reversal, the appropriate order is for a new trial not an acquittal as it is not at all clear that the judge found a factual basis justifying the blow to the complainant's head if the handcuffing was not an unlawful exercise of the appellant's authority.

DISCUSSION AND CONCLUSION

- [33] The legal context for the determination of the trial judge is formed by s. 25 and s. 495(1), (2) and (3) of the Criminal Code.
- [34] Section 495 generally, deals with arrests without warrant by peace officers. Section 495(1) insofar as relevant provides as follows:
- (1) A peace officer may arrest without warrant
 - (b) a person whom he finds committing a criminal offence.
- [35] It is common ground that for purposes of s. 495(1)(b) by virtue of s. 133 of the Offence Act, R.S.B.C. 1996, c. 338 that an infraction of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 is "a criminal offence".
- [36] Section 495(2) places limitations on a police officer's authority to arrest without warrant. So far as relevant to the present case, s. 495(2) reads as follows:

A peace officer shall not arrest a person without warrant for

- (c) an offence punishable on summary conviction

in any case where

- (d) he believes on reasonable grounds that the public interest, having regard to all the circumstances including the need to
 - (i) establish the identity of the person,
 - (ii) secure or preserve evidence of or relating to the offence, or
 - (iii) prevent the continuation or repetition of the offence or the commission of another offence,
- may be satisfied without so arresting the person

- [37] Section 495(3) deals with the consequences of effecting an arrest without warrant. It reads as follows, so far as relevant:
- (3) Notwithstanding subsection (2), a peace officer acting under subsection (1) is deemed to be acting lawfully and in the execution of his duty for the purposes of
- (a) any proceedings under this or any other Act of Parliament;
- [38] Following submissions, I reserved judgment. After doing so, I sought further submissions from counsel on the effect, if any, of s. 495(3)(a) on the issues raised in the present case.
- [39] Counsel for the Crown submitted in response that "It was not merely the detention or arrest which constituted the act which was not required or authorized by law, but rather the unjustified use of handcuffs." Crown counsel submitted that "Section 495(3) protects the police from committing a crime by arresting someone where the grounds to do so outlined in s. 495(1) exist, but where the arrest was not necessitated by dint of the pre-requisites mandated by s. 495(2), s. 495(3) does not shield a police officer from the unwarranted use of force during an arrest. Hence, the section had and has no applicability."
- [40] In his reply, counsel for the appellant submitted in part as follows at paragraphs five and six:
5. If a police officer has the power to arrest under s-s (1), but should not arrest under s-s (2), does that mean the officer is not acting in the execution of his duties if he arrests a person notwithstanding s-s (2)? Can the arrestee defend a charge of resisting arrest on the ground that the police officer was not acting in the execution of his duties? Is a police officer who uses reasonable force in effecting an arrest nevertheless liable on a charge of assault on the ground that he was not acting in the execution of his duties, so no amount of force was justified?
6. The answer to those questions is clear in proceedings under the Criminal Code or another Act of Parliament: the officer is deemed to be acting in the execution of his duties even if he should not have arrested for the reasons stated in s-s (2). The arrestee may not defend a charge of resisting arrest by relying on (2); and a police officer is not liable for a charge of assault on the theory that, not being in the execution of his duties, no amount of force was justified.
- [41] The trial judge's reasons for finding that the appellant's arrest and handcuffing of the complainant was not justified under s. 25 of the Code are set out in paras. 23 - 29 as follows:
- [23] The defendant was unable to point to an objectively observable reason for his stated belief that the complainant presented a danger to the defendant or anyone. The complainant was clearly rude to the defendant ("dismissive") and unhappy about what was happening. However, there were no threats, no threatening gestures, and no history of violence.
- [24] The defendant, his counsel, and Constable Yaremy described the complainant as "non-compliant," but in reality, he was compliant. I was pointed to the complainant's supposed refusal to move back onto the sidewalk to allow the complainant -- or the defendant, rather,

to get up onto it after the complainant had gone up onto it at the defendant's command. However, unlike most of what the defendant told me about the factual events here, I do not believe this and reject it as untrue. Only the defendant described this exchange. The complainant denied it and both Schwarz and Constable Yaremy did not testify to seeing it or hearing it. Finally, it just did not strike me as a believable part of the defendant's testimony and I did not believe it.

- [25] In fact, despite being argumentative and profane, the complainant was generally quite compliant (albeit reluctantly compliant) until the defendant started to handcuff him and, even then, he cooperated at first by turning and putting his hands behind his back. It was only after the handcuffing had progressed and the complainant's hands were behind his back with one cuff on it that the defendant and his partner said the complainant began to resist. (It must be said that the complainant categorized what happened here quite differently). However, even if the complainant was resisting being handcuffed, as the cuffing was unlawful, his resistance to it would not excuse the defendant's assaultive punch, which was said to be intended to end that resistance.
- [26] The defendant and his partner categorized the complainant's behaviour as "aggressive," and "emotional," and "argumentative." They said he kept getting angrier. The defendant also said the complainant was making more eye contact with him (although at another point in his testimony the defendant found it ominous that the complainant was breaking such eye contact), but again and again, the defendant and Constable Yaremy confirmed that before they began to handcuff the complainant he did what he was told and did not threaten anyone either directly, indirectly, or physically.
- [27] He did not use threatening words, he did not make threatening gestures, and he did not move towards the defendant or his partner in a threatening fashion. He was compliant, albeit compliant reluctantly. In short, there was no evidence of an objectively observable reason for the defendant to believe the complainant was a threat to anyone's safety.
- [28] Arresting or detaining and handcuffing someone in a public place like this is a serious, humiliating, and undoubtedly scary thing to do. It has to be warranted by an objectively discernible reason. That did not exist here.
- [29] Counsel referred me to the B.C. Supreme Court decision of *R. v. Fettes*, decided November the 2nd, 2001, as support for their position that the complainant's actions here warranted being de facto arrested or detained and handcuffed. However, again, although there are similarities (police observing motor vehicle infractions by a bicyclist), it is the differences that are important. In *Fettes*, the bicyclist when stopped made several threatening gestures and appeared to have a weapon. Those objectively discernible reasons supported the officers' fear for their safety and this "authorized" the arrest or detention and the handcuffing of the subject, which is very different from the situation at bar.

- [42] As earlier noted, the trial judge's ultimate conclusion was "the initial condition precedent for the application of s. 25 defence has not been met." The "initial condition precedent" for the application of s. 25 is that the officer be required or authorized to do what he or she is doing.
- [43] Contrary to the respondent Crown's argument, the trial judge did not simply find the appellant's use of handcuffs to be an "unwarranted use of force" during an arrest. Although he did not expressly refer to s. 495(2), what he appeared to find was that an absence of "objectively discernible reasons" under that section made "arresting or detaining and handcuffing someone" unauthorized or unlawful (para. 28). (Emphasis added). In other words, the judge found no authorization to arrest and a fortiori no basis to handcuff.
- [44] Had the judge found that the handcuffing was an unwarranted use of force during an arrest otherwise deemed lawful by s. 495(3), he would not have referred to "the initial condition precedent" for the application of s. 25 as the reason why the defence failed. Rather, he would have found that the use of handcuffs was more force than was necessary to accomplish the arrest and found that the use of handcuffs as well as the appellant's blow to the complainant's head to be part and parcel of the assault.
- [45] In his Reasons for Judgment, however, the judge appeared to find that only the appellant's punch of the complainant when he resisted being handcuffed was an assault. That conclusion is fortified by his Reasons for Sentence in which he described the assault as "a single punch to the head of a civilian bicyclist who he had wrongly arrested after observing a motor vehicle infraction".
- [46] That being the case, the only ostensible basis for the judge's finding that the handcuff arrest was wrongful (without being unlawful in the sense of being an offence) and the punch to enforce it an assault, was because it did not meet the conditions of s. 495(2).
- [47] In other words, the judge did not assess the lawfulness of the appellant's use of handcuffs in the context of a finding that he was authorized to arrest the appellant under s. 495(1). Rather, he appears to have treated the arrest involving the use of handcuffs as unauthorized because the circumstances should have justified the appellant's belief, on reasonable grounds, that the public interest, having regard to the non-exhaustive conditions in s. 495(2), could be satisfied without an arrest.
- [48] If indeed that was the judge's reasoning, he failed to give proper effect to s. 495(3) which deems the appellant to be acting lawfully and in the execution of his duty in effecting an arrest notwithstanding subsection (2).
- [49] I conclude, the trial judge's failure to consider the effect of s. 495(3) necessitates a new trial. In *R. v. Cayer* (1988), 66 C.R. (3d) 30 (ONCA), leave to appeal to the SCC ref'd [1999] 1 S.C.R. viz the court held as follows:

[A] peace officer exercising his power of arrest without warrant under section 450(1) [now 495(1)] is deemed by s. 450(3) [now 495(3)] to be acting lawfully for the purpose of any proceeding under the Code or any other Act of Parliament, even though in arresting a person without warrant he has breached the duty imposed on him by s. 450(2) [now 495(2)] not to arrest the accused in the circumstances therein specified

[50] In *R. v. McKibbin* (1973), 12 C .C.C. (2d) 66 (B.C.C.A.) at para. 10, the Court held as follows:

But in my view subsection (3) which specifically applies notwithstanding subsection (2) makes it clear that a peace officer who acts under subsection 1(a) is deemed to be acting lawfully for purposes (inter alia) of any proceedings under the Code. In my view that means that as he is arresting without warrant with the grounds of belief set out in subsection 1(a) he is acting lawfully and his arrest is lawful.

[51] In my view, by failing to consider or apply s. 495(3), the judge fell into error in concluding the appellant's de facto arrest (by handcuffing) of the complainant was not authorized because it did not meet the conditions of s. 495(2).

[52] To some extent, the difficulty in this case arises from the fact that the judge determined it on a basis which had not been addressed by counsels' arguments before him. There is, accordingly, a lack of context to his decision and it is difficult to understand or assess his reasoning properly. Had the judge alerted counsel to what he considered to be a critical issue, and entertained their submissions, the legal path he followed to conviction may have been more clearly illuminated.

[53] As it stands, however, it is simply unclear whether or to what extent the judge's reasons implicate s. 495(2) and whether they represent a failure to apply s. 495(3) properly.

[54] In all the circumstances including the fact that the judge made no clear findings of fact in relation to whether or not the blow, which is the subject of the charge, would or would not have constituted an assault had he found the appellant to be acting in the execution of his duty, I see no recourse but to order a new trial.

"A.F. Cullen ACJ."

Associate Chief Justice Cullen

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Prepared on 28 October 2026 · Esheria