

CANADA / JUDGMENT

R. v. Frank

2023 BCSC 202

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2023 BCSC 202 R. v. Frank

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Frank,

2023 BCSC 202

Date: 20230210

Docket: 37002

Registry: Williams Lake

Between:

Rex

Respondent

And

Jeane Marie Frank

Appellant

Before: The Honourable Justice Schultes

On appeal from: An order of the Provincial Court of British Columbia, dated August 17, 2021.

Reasons for Judgment

Counsel for the Appellant:

R.L. Kaiser

C.A.H. Hauser

Counsel for the Respondent:

J.M.M. Dufour

Place and Date of Hearing:

Williams Lake, B.C.

April 21 & 22, 2022

Place and Date of Judgment:

New Westminster, B.C.

February 10, 2023

Introduction

[1] This is an appeal by Ms. Frank of her conviction for obstructing a peace officer, Cst. Duquette of the RCMP, on September 8, 2020. The trial judge found that Ms. Frank had interfered with Cst. Duquette's efforts to arrest her adult son Riley Frank[1] outside of her home, by impeding his progress as he ran after her son.

[2] Her counsel argues that the judge erred by:

- failing to reconcile the conflicting versions of her actions in the testimony of the police officers who dealt with her;
- misdirecting herself on the mens rea of the offence;
- providing insufficient evidence of how the essential elements of the offence had been proven; and
- rendering a verdict that is unreasonable or unsupported by the evidence.

Relevant Evidence at Trial

- [3] On the evening of September 8, members of the RCMP went to Ms. Frank's house to attempt to arrest Riley. They believed that he had committed a domestic violence-related mischief at another location, and there was a warrant outstanding for his arrest on another matter.
- [4] The occupants did not allow the officers to enter the house to look for him, so the officers formed a perimeter around it to prevent him from escaping, and made arrangements to obtain a warrant authorizing them to enter it and carry out the arrest.
- [5] After the warrant had been obtained, but before the officers entered the house, Riley fled out of the rear of the house.

- [6] Cst. Duquette had been assigned to watch that area of the house. He began to chase Riley, who ran through a gap in the fence on the property. There was evidence that the property slopes downward toward this fence.
- [7] Ms. Frank and her co-accused Ms. Alphonse, who was not dealt with in this trial, were outside of the house in the same area. A few minutes earlier, Ms. Frank had engaged in a verbal confrontation with the officers about their authority to be on her property (although she ended up giving the officers a key to the house so that they would not damage the door when they entered).
- [8] Cst. Duquette said that as he was running after Riley, he saw Ms. Frank in his peripheral vision, running towards him. He described her as being on an "intercept course" with him, and that she was running at her "best possible speed". In cross-examination he explained that this meant that Ms. Frank (and Ms. Alphonse) were proceeding at "[a]s best of a run as they could manage at the time, considering their physical condition, level of intoxication." In his view running involves the "moving of the legs as fast as your body will carry you". Although he regretted his choice of words, he agreed that in his police report he had described Ms. Frank's movement as "drunken waddling". In explaining his use of the term "waddling", he drew an analogy to speed walkers, who have "a bit of a waddle when they walk as in the movement of the hips."
- [9] Ms. Frank managed to "get to" him as he was running through the gap in the fence, he said. She was in motion until he passed her. He was later told by another officer that he put his arm out to stop her, but he did not remember having done that - he "just kept running after Riley."
- [10] He said that he did not recall anything that had obstructed him in that interaction with Ms. Frank. However, he qualified this by explaining that it was his first foot pursuit of this kind, and that as a result "tunnel vision kicked in". He was so focused on not allowing her son to escape that "a lot of things tuned out, basically".

[11] Most significantly on this point, he had the following exchange with Ms. Frank's counsel:

Q: And in fact on this particular day, although you have no recollection of her making any contact with you or you making any contact with her, she never impeded your movement towards [her son], to catching him

A: Correct

[Emphasis added]

- [12] Cst. Martin, another attending officer, testified that he went around to the rear of the house after he heard a radio communication from Cst. Duquette saying that Riley was running away. He saw Riley fleeing, with Cst. Duquette in pursuit. He joined the pursuit.

- [13] He described Ms. Frank as being in a "football stance waiting for [Cst. Duquette] to arrive". He further defined this stance as "ready to a tackle" and "ready for someone to come at her". Her feet were planted in a shoulder-wide stance and her hands were in front of her in a "grapple stage". She was facing Cst. Duquette, who was running directly towards her, which was also in the direction of the gap in the fence. In other words, she was in Cst. Duquette's way as he approached the gap. (Cst. Martin described this gap as the "gate" in his evidence.)
- [14] He said that at that point that she "reached out" with both arms to Cst. Duquette, who "put his arm out and more move[d] her aside and continued pursuing after [her son]" Cst. Martin described her motion "more of a lunge and a stationary position towards [Cst. Duquette]" (by which he may have meant "from" a stationary position). Her arms had previously been at her side, at shoulder-width, and her movement was to bring them up to chest level. Cst. Duquette's arm "put her off balance", he added.
- [15] When it was suggested to him in cross-examination that Ms. Frank's actions were " perfectly consistent with someone that's trying to protect themself[ves] from being bulldozed down straight-armed by an officer, right? That's as consistent as what you're saying?", he fairly responded, "On those lines, yes."
- [16] He did not see Ms. Frank change her position in relation to the gap after Riley ran through it. Riley ran between her and Ms. Alphonse, and was not impeded by them (that is, by their positions, I took it) in doing so. Cst. Martin clarified that it was Ms. Alphonse who was directly in front of the gap, and that she was "off-centre" of Ms. Frank.
- [17] When he reached the area of the gap Ms. Alphonse grabbed his police vest and so he "put her onto the ground".
- [18] He initially described it as being about ten seconds from the point that he saw Riley running to the point that he reached Ms. Alphonse, although later in his cross-examination, in the context of how long Ms. Frank and Ms. Alphonse had to get out of the officers' way, he said, "Even if it was like 10,15, 20 seconds "
- [19] Cst. Hogue-Denomnee was also part of the containment around the house. From his position he had a view of Cst. Duquette to his left. He saw Riley leave the house and run towards the fence. Ms. Frank and Ms. Alphonse were in the area towards which Riley was running. She and Ms. Alphonse were "laughing and yelling profanities", he said.
- [20] Cst. Hogue-Denomnee had the following relevant exchange with Crown counsel in his direct examination:

A: I actually saw I think it was Trina Alphonse trying to block Constable Duquette.

Q: How? Did you -- what did you see?

A: Well, she was -- they were making big movements, moving their hands, running back and forth, obviously in a way to trying to block us or trying to throw us off.

Q: How? Why you say "obviously?" What were they do -- what was blocking you?

A: Well, so they were coming in our way and moving back, so I saw Constable Duquette actually trying to avoid, and doing one of these serpentine, trying to avoid, so obviously this was slowing him down in his race.

Q: Okay, so --

A: In his chase to Mr. Frank.

Q: Okay. And then you saw Constable Duquette do maybe a manoeuvre to get around?

A: Trying to avoid them, yeah.

Q: Them or one of them in particular?

A: I think it was Trina that he was trying to avoid, but I'm not sure[2].

[21] With respect to Ms. Frank, he did not recall any physical contact between her and Cst. Duquette, but did see him "changing his direction very quickly to avoid her". It was "possible" that Cst. Duquette had pushed her away with a straight arm.

[22] He also described Ms. Frank extending her leg and trying to trip Cst. Martin, who was behind Cst. Duquette in the pursuit. Cst. Martin was able to avoid being tripped.

[23] Just before he reached the fence, Cst. Hogue-Denomnee ran into Ms. Frank, causing her to fall down. He said that he was running as fast as he could, she was running back and forth, and she "eventually made a move that [he] was unable to predict." He said that she had "much time to get out of the way".

[24] He described the speed of Ms. Frank's movements back and forth as "a faster pace definitely than just walking".

[25] In light of the manner in which she had gotten in his way, and the previous actions he had seen her take in relation to Cst. Duquette and Cst. Martin, he arrested her for obstruction.

[26] He agreed that it took about ten seconds for him to run from the place where he had been standing to the gap in the fence. I took it that all of his observations about the actions of Ms. Frank and Ms. Alphonse were made during this period.

[27] Like Cst. Martin, Cst. Hogue-Denomnee did not see Ms. Frank and Ms. Alphonse trying to block Riley as he ran past them.

Reasons for Judgment

[28] The trial judge's essential reasoning leading to the conviction was:

- [19] As stated earlier, all three [police officers] gave different versions of the specific actions of Ms. Frank. Notwithstanding the officers' different versions, I find that they were externally consistent on key collateral elements of the offence [Here the trial judge summarized the events before Riley fled the house.]
- [20] I find that there is external consistency between all three that place Ms. Frank and the co-accused in the middle of the fray one way or another. They all describe that the exit of Riley Frank and the chase occurred quickly over a matter of seconds. Exhibit 1 and 2 drawings, respectively by Constable Martin and Duquette, are consistent in the placement of the house, the opening, and location of Ms. Frank, and the co-accused between the officers and the opening before Riley Frank exits the house. All describe a relatively small opening at the bottom of the slope that they are barreling towards at top speed and describe Ms. Frank and the co-accused at or near the entrance one way or another. Each describe her presence at the entrance differently. Constable Duquette sees her run towards him. Constable Martin sees her stationary. Constable Hogue-Denomnee sees her running back and forth waving her arms about and trying to trip.
- [21] In my view, all versions are compatible when observed at different viewpoints over time period of approximately 10 to 20 seconds which was consistently described by each of the officers who focused on different things at different times. Constable Duquette and Hogue-Denomnee see her moving toward them and have to take evasive action. Constable Hogue-Denomnee and Constable Martin see Constable Duquette put his arm out to avoid her. I take notice, as I have said, that these observations are made in the context of a highly charged and unexpected situation with, as the officers testified, and I accept, as of pursuing a violent offender with an outstanding warrant who had just ran past the officers through the back door of a house and was heading towards a vehicle to potentially escape.
- [22] The evidence was uncontroverted on the following key points: the police arrived at the property in fully marked vehicles and in uniform; they advised Ms. Frank as to their purpose, what, who, they were investigating; that Ms. Frank responded assertively about her rights and the police being present illegally; that Mr. Mr. Frank was paged loudly through a PA to come out of the house voluntarily; that Ms. Frank and Ms. Alphonse were quite animated, aggressive, loud, and yelling, and swearing at the officers and had to be calmed down; that Mr. Mr. Frank bolted unexpectedly out of the house towards an opening in a low fence where there is a vehicle; the foot chase by police officers takes approximately 10 to 20 seconds from the house to the vehicle where he is apprehended; and Exhibits 1 and 2 shows space on the property for Ms. Frank to go without getting in the path of the officers.

- [23] I find that, although the officers had different versions of the method of obstruction, their evidence was internally and externally consistent with the elements of the offence. And again, I will repeat that she knew that Constable Duquette was a police officer; knew his duty or reason for being there; and she "foresaw with substantial certainty that doing the actions that she did would obstruct Constable Duquette."
- [24] On the evidence as a whole, I find her conduct was not accidental, reckless or careless, but purposeful and wilful. It is not like the example set out in [R. v.] Alsager, 2016 SKCA 91, where a parked vehicle in a narrow lane blocks a pursuit of police officers in pursuit of a subject. In my view, on the uncontroverted evidence, Ms. Frank went towards the action.
- [25] I find that moving towards Constable Duquette while he was in pursuit of her son created an intentional barrier to Constable Duquette and, accordingly, I find Ms. Frank guilty of obstructing a police officer.

Appellant's Position

- [29] Ms. Frank's counsel submits that the trial judge failed to articulate the specific actions that Ms. Frank took, and how those actions had the effect of obstructing Cst. Duquette in the execution of his duty. In that respect, the trial judge appeared not to appreciate that an essential element of the offence is that "the obstructing affected the constable in the execution of a duty that he was then executing": R. v. Westlie, (1971) 2 C.C.C. (2d) 315 at para.43 (B.C.C.A.). Put another way, the results of an accused's actions play a role in determining whether the actus reus of the offence has been established: R. v. Khan, 2014 ONSC 6541 at para.31. Thus, the finding of guilt here flies in the face of Cst. Duquette's evidence that he did not recall anything that Ms. Frank had done that obstructed him, and his subsequent concession that he was never impeded in his movement towards Riley by her. The trial judge's failure to address the conflicting observations of the officers obscured that fatal shortcoming.
- [30] Her counsel argues that the trial judge also misunderstood the mens rea of the offence, in particular the requirement that the conduct that an accused engages in must be intended by the accused to obstruct the peace officer in the execution of their duty: R. v. Noel, (1995) 101 C.C.C. (3d) 183 at para. 53 (B.C.C.A.). As shown in para. 23 of her reasons (reproduced above) she believed that the mental element was satisfied if Ms. Frank "foresaw with substantial certainty" that Cst. Duquette would be obstructed, which falls short of intending that her actions would cause it. In addition, the unresolved conflicting versions of events described by the officers give rise to various scenarios in which she could plausibly have been intending something other than the goal of obstructing him.
- [31] Her counsel says that a key indication that the trial judge did not understand this point correctly is that in her reasons she quoted him as arguing that Ms. Frank's recklessness as to the effect of her conduct would not be sufficient for a finding of guilt, when in fact he had conceded that such a state of mind could be sufficient. Similarly, she contrasted her findings

that Ms. Frank had the necessary mens rea to her actions being "accidental, reckless or careless". Once again, she appeared to regard those states of mind as falling short of the mens rea requirement, when recklessness does not.

- [32] The deficiencies in analyzing how the essential elements of the offences were fulfilled also lead to a concern about the sufficiency of the judge's reasons, in light of the requirements established by the Supreme Court of Canada in *R. v. Sheppard*, [2002] 1 S.C.R. 869. It is argued that these deficiencies produced reasons for conviction that are not "reasonably intelligible to the parties and [do not] provide[] the basis for meaningful appellate review of the correctness of the trial judge's decision" (para. 55).
- [33] Finally, Ms. Frank's counsel submits that the obvious existence of a reasonable doubt, once the evidence is correctly analyzed, means that the verdict of guilt is not one that a properly instructed jury acting judicially could reasonably have rendered, and the appeal can also be allowed on that basis: *R. v. Biniaris*, [2000] 1 SCR 381 at para. 36.

Respondent's Position

- [34] Addressing proof of the actus reus, Crown counsel notes that it is not required, in order for the offence of obstruction to be carried out, that a peace officer be "wholly prevented" from carrying out their duty: *R. v. Tortolano* (1975) 28 C.C.C. (2d) 562 at p.565. Indeed, the relevant element of the actus reus that was described in *Westlie* requires only that the officer be "affected" by the accused's action.
- [35] In keeping with this analysis, more recent decisions in this province have used terms such as "resistance" (*R. v. Hale*, 2009 BCSC 357 at para. 18) and "interference" (*R. v. Glowach*, 2011 BCSC 241 at para.65), which also do not connote the absolute frustration of the officer's execution of their duty.
- [36] Applying these principles to the present circumstances, the Crown submits that it is reasonable to infer that the trial judge, having accepted the evidence of the three officers about the actions that they saw Ms. Frank carry out, found that those actions had distracted Cst. Duquette and physically interfered with his efforts to arrest Riley to some degree. In particular, the trial judge described how Ms. Frank "moving towards" Cst. Duquette while he was pursuing Riley "created an intentional barrier" to the officer. This was certainly sufficient to satisfy that element of the actus reus.
- [37] With respect to the trial judge's alleged error in addressing the mens rea of the offence, Crown counsel takes issue with the submission that an accused must intend that their actions will obstruct the officer. In *Glowach* the court endorsed the proposition in *R. v. Bentley*, 2003 CarswellQue 1994 (Que. Cour municipale, Ville de Montreal) that:
18. It is therefore not necessary to form a specific intent to act in such a way as to specifically obstruct the peace officer's duty. It is sufficient that the offender have a general intent to do an act which has, in fact, obstructed the peace officer.

- [38] On the question of whether Ms. Frank's actions support an inference of that general intent, the Crown points to the findings by the trial judge of animus on her part towards the police (expressing displeasure, being aggressive, yelling, swearing, etc.), and submits that it was reasonable for the judge to find that this animus was reflected in the intent that accompanied her actions.
- [39] Crown counsel submits that in the context of a short trial, with the narrow issues of what specific actions Ms. Frank engaged in and whether they were intentional, the trial judge's reasons were more than adequate. In particular, she addressed the conflict in the officers' observations and made specific findings of the level of intent that accompanied the actions she found had occurred. As counsel expressed it, "There was little more for the trial judge to say". Further, Sheppard explicitly acknowledged at para. 55 the "general press of business" in the criminal courts, and emphasized that reasons for judgment in that context do not need to resemble jury instructions.
- [40] Finally, it is implicit in the Crown's position on the other substantive issues that there was certainly a basis on which a reasonable trier of fact could have rendered the verdict that the trial judge arrived at here, so a finding that the verdict was unreasonable or unsupported by the evidence cannot succeed.

Discussion

- [41] Dealing first with proof of the actus reus, Crown counsel is quite correct that it is not necessary for an accused's actions to completely frustrate a peace officer's execution of their duties for that element of the offence to be satisfied. The Khan decision, which was relied on by Ms. Frank's counsel, analyzed the authorities and concluded that what is required is something more than a "fleeting or momentary diversion", and that the de minimis principle applies to actions of an accused that do not produce such an effect: see paras. 24-25.
- [42] The problem with the present decision however, is not with the degree of interference that was found. My conclusion is that the trial judge erred in her analysis of whether the actus reus had been committed, by failing to address and reconcile key evidence on the essential element of whether Cst. Duquette's ability to act in the execution of his duty in arresting Riley was affected at all by Ms. Frank's action.
- [43] Her assertion that "all versions are compatible when observed at different viewpoints over time period of approximately 10 to 20 seconds" failed to take into account Cst. Duquette's own evidence that Ms. Frank never impeded his movement towards Riley. It was essential, if the trial judge was to prefer Cst. Martin and Cst. Hogue-Denomnee's descriptions of Cst. Duquette having to avoid Ms. Frank over Cst. Duquette's own version of events, to explain how she was able to do so.
- [44] For example, the trial judge might have found that the "tunnel vision" that he described, resulting in "a lot of things" getting "tuned out", meant that he was unaware of the full extent of the actions that Ms. Frank took towards him, or his own physical reactions to it. Instead,

she found that what he and the officers described were all reconcilable as different perspectives on the same events over the period of time in which the interaction with Ms. Frank occurred, without addressing how Cst. Duquette's own perspective might have affected that finding. This was an error.

[45] Although that conclusion is sufficient to resolve the appeal, I will also address the other grounds.

[46] I am not persuaded that the trial judge erred in identifying the presence of the required mens rea. She made the express finding that Ms. Frank "foresaw with substantial certainty that doing the actions that she did would obstruct Constable Duquette." This was the exact language used by the Saskatchewan Court of Appeal in the Alsager decision that she referred to:

52 [I]n order to give effect to the language of s. 129(a), and Parliament's apparent intention in enacting it, it is not necessary to restrict the scope of the provision to situations where an offender has a conscious purpose to obstruct a peace officer. As pointed out by Martin J.A. in Buzzanga at paras 40-46, if a person who foresees that a consequence is certain or substantially certain to result from an act, the person can be taken to have intended the consequence even if the act is done to achieve some different purpose: see also Morris Manning, Q.C., and Peter Sankoff, Manning, Mewett & Sankoff: Criminal Law, 4th ed (Markham: LexisNexis Canada Inc, 2009) at 164.

53 All of this leads me to conclude that the mens rea aspect of s. 129(a) requires the Crown to prove beyond a reasonable doubt that (a) the accused knew the individual obstructed was a peace officer or other person listed in s. 129(a), (b) the accused knew the individual obstructed was in the execution of his or her duty, and (c) the accused either had an intention to obstruct the peace officer or foresaw with certainty or substantial certainty that doing the act in question would obstruct the peace officer.

[Emphasis added]

[47] I do not see this analysis as being inconsistent with the intention to obstruct the officer that was required by our Court of Appeal in Noel - a decision that was relied on by Ms. Frank's counsel. The Saskatchewan Court of Appeal was simply elaborating on the circumstances in which the intention to bring about that result will be found. Both decisions are inconsistent with the Bentley decision that was cited in Glowach however, and I do not think that Bentley correctly states the law, at least in this province.

[48] In any event, I am satisfied that the trial judge ascribed a legally sufficient level of mens rea to Ms. Frank here, even though there was an error in analyzing what actions it applied to.

[49] The other grounds may be resolved in a more straightforward way.

- [50] Despite the error I have found, the trial judge's reasons were not deficient in themselves in any respect. The basis on which she found Ms. Frank guilty was readily discernable, and meaningful appellate review was obviously possible, since the error identified was part of the express reasoning.
- [51] Further, while the likelihood of it occurring is debatable, in the course of considering the trial judge's analysis of the actus reus I have identified a basis in the evidence on which a properly instructed trier of fact, acting judicially, could reasonably have found Ms. Frank guilty of this offence.

Conclusion

- [52] The appeal is allowed.
- [53] As a general rule, if the appeal court is satisfied that the entirety of the record at the end of the appeal admits of a reasonable possibility of a conviction on a retrial, the appeal court will order a new trial: Truscott (Re), 2007 ONCA 575, at para. 248. As I have said, that reasonable possibility exists here, so I will order a new trial.
- [54] It will be up to the Crown, in the exercise of its discretion, to decide whether such a trial is necessary or appropriate.

"Schultes J."

- [1] I will refer to Mr. Frank by his first name, because having to distinguish between "Mr. Frank" and "Ms. Frank" throughout the narrative would make it more difficult to follow.
- [2] In his submissions Ms. Frank's counsel characterized Cst. Hogue-Denomnee as having corrected his initial assertion that Ms. Alphonse was the one who actually impeded Cst. Duquette, so this aspect of his testimony was not put forward in support of the appeal.

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