COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: [redacted]

Date: 20130117
Docket: [redacted]

Between:

Regina

Appellant

And

[redacted]

Respondent

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Hall
The Honourable Madam Justice D. Smith

On appeal from: Provincial Court of British Columbia, June 13, 2011
([redacted])

Counsel for the Appellant:	W.P. Riley
Counsel for the Respondent:	R.L. Neary
Place and Date of Hearing:	Victoria, British Columbia October 24, 2012
Place and Date of Judgment:	Vancouver, British Columbia January 17, 2013

Written Reasons by:
The Honourable Mr. Justice Hall

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Madam Justice D. Smith

Reasons for Judgment of the Honourable Mr. Justice Hall:

[1] The Crown appellant appeals from a decision of the Honourable Judge Wood pronounced June 13, 2011. In that decision, the learned judge ruled inadmissible as evidence a plastic bag containing four smaller plastic baggies of cocaine. The bag had been seized by a police officer from the respondent, [redacted] on December 31, 2009. The drugs had been discovered following a search of [redacted] person incidental to his arrest. [redacted] was charged with possession of cocaine for the purpose of trafficking. The ruling of the judge resulted in [redacted] acquittal.

[2] Some background facts of the case are conveniently set forth in the reasons of the judge:

> [3] On December 31, 2009, officers of the local RCMP detachment were conducting a road block screening for impaired drivers on King George Road at the intersection of South Shore Road in Lake Cowichan. At 19:10 hrs. Const. Cranmer stopped a car driven by [redacted] who was the lone occupant of the vehicle.
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> [4] Const. Cranmer approached and stood next to the open driver's door window. He asked [redacted] if he had had anything to drink that evening. The officer was, to use his words, "looking for the possible odour of liquor." With what he described as the first breath he took in he noted the smell of freshly burnt marihuana. He immediately advised [redacted] that he was under arrest for possession of marihuana.
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> [5] The officer testified that at that time he had had several occasions to smell burnt marihuana which he described as a very distinctive smell, different from vegetative marihuana. He characterized the odour on this occasion as strong, leading him to believe it had been smoked within 15 minutes prior to the stop.

[3] The police officer also stated in his evidence that he had conducted at least 30 investigations "where the odour of burnt or burning marihuana was detected by myself and I'd made many drug seizures, finding marihuana and contaminated paraphernalia incidental to arrest at those traffic stops".

[4] At a trial held over a series of dates in the winter and spring of 2011, a *voir dire* was conducted to determine whether the search of [redacted] was unreasonable and in violation of his rights under s. 8 of the *Canadian Charter of Rights and Freedoms*. The judge noted in his reasons that "the Crown relies only on the decision of

Const. Cranmer to arrest [redacted] based upon that officer's conclusion that he smelled burnt marihuana when standing at the open window of the latter's car".

[5] [redacted] had been arrested for possession of marihuana. Having regard to the circumstances of the case (smell only emanating from the vehicle), it is common ground that the offence, if any, could only amount to an offence punishable on summary conviction. This makes applicable the following provision of the *Criminal Code,* R.S.C. 1985, c. C-47, which defines the powers of a peace officer to arrest:

> 495. (1) A peace officer may arrest without warrant
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> ...
>
> (b) a person whom he finds committing a criminal offence;
>
> ...

[6] As the Crown notes in its factum, there may be some debate in the cases as to whether the power to arrest exists only when an officer sees an offence being committed or observes facts from which an inference may be drawn that an offence is being committed. It would be well to avoid undue casuistry in this area and it seems to me that a peace officer could legitimately arrest a person if it is apparent that an offence is being committed by such person. This requirement has both subjective and objective components. A peace officer exercising the arrest power must provide some sensible reason for believing an offence was being committed by the person arrested.

[7] In the case of *R. v. Biron*, [1976] 2 S.C.R. 56, 23 C.C.C. (2d) 513, Martland J. observed at 75, "the power to arrest without a warrant is given where the peace officer himself finds a situation in which a person is apparently committing an offence". I take the word "apparent" to require an objectively sensible apprehension by the arresting officer that an offence is being perpetrated by the person arrested.

[8] That appears to be consistent with what Lamer J. (as he then was) said in *R. v. Roberge*, [1983] 1 S.C.R. 312, 4 C.C.C. (3d) 304, at 324:

> ... I do not read the test laid down by Martland J. as suggesting that it is sufficient that it be "apparent" to the police officer even though it would be unreasonable for the police officer to come to that conclusion. Surely it must be "apparent" to a reasonable person placed in the circumstances of the arresting officer at the time.

[9] The question posed by the circumstances of this case is whether what was apparent to the nose of the officer during his interaction with [redacted] on the date of

the arrest sufficed to render the arrest of [redacted] a lawful one. The officer testified that he had previously encountered what he described as the burnt odour of marihuana and he described the odour emanating from the respondent's vehicle as strong, leading him "to believe that marihuana had been smoked within 15 minutes prior to the stop".

[10] The judge said this about the arrest:

> [57] As was the case in *Janvier*, the decision to arrest [redacted] in this case was made by Const. Cranmer on his observation of the smell of burnt marihuana alone, without any other observation apparent to him from which it could properly be concluded that [redacted] was then in possession of marihuana. At no time prior to the arrest did Const. Cranmer see any marihuana in [redacted] possession, nor did the officer see [redacted] engaged in any act from which actual possession could properly be inferred. There was no evidence of any ongoing criminal activity taking place in the presence of Const. Cranmer when he stood beside [redacted] car and sniffed the smell of burnt marihuana. The best that could be said is that Const. Cranmer suspected, on what he believed were reasonable grounds, namely his past experience, that [redacted] was in possession of marihuana. Indeed, as the officer himself testified, he arrested Mr. Boyd in the hope that he would find some evidence of a drug related criminal offence.

[11] The judge expressed his conclusion about the lawfulness of the arrest thus:

> [56] ... The law requires that inferences drawn from proven facts must be reasonable. The reasonable inference to be drawn from the smell of burnt marihuana, whether one estimates the burning to have taken place in the immediate past or hours previously, is that the marihuana which was the source of that smell no longer exists. It has been consumed by fire. In my view, it would be unreasonable, as a matter of both law and logic, to draw an inference of present possession from nothing more than evidence of past possession.

[12] The trial judge placed reliance upon the decision of the Saskatchewan Court of Appeal in *R. v. Janvier*, 2007 SKCA 147, 227 C.C.C. (3d) 294. *Janvier*, somewhat like the instant case, was a case where a peace officer had stopped a person for a motor vehicle infraction and detected a smell of burnt marihuana emanating from the vehicle. The accused was arrested for possession of marihuana and a search of the vehicle turned up drugs and other items that resulted in the accused being charged with possession of marihuana for the purpose of trafficking. A trial judge found the arrest and consequent search unlawful, and acquitted the accused. The Saskatchewan Court of Appeal sustained the acquittal.

[13] In the course of her reasons, Jackson J.A. said this:

> [30] When one examines the decisions where courts have sustained an arrest based on the smell of burned marihuana, and no other sensory perception, they rely, in addition to the smell of burned marihuana, upon an inference that more marihuana will be discovered. In *Biron*, however, Martland J. makes it clear that the Court interprets the phrase "finds [a person] committing a criminal offence" as implying that the officer's belief an offence is being committed is based on his or her observation of that offence being committed (or apparently being committed) and not merely an inference from some other observation. [Emphasis added.] That is why Martland J. went on to say "there is no reason to refer to a belief based upon reasonable and probable grounds."[27] Thus, s. 495(1)(b) does not permit the officer to say "based on my experience, I believed I would find other marihuana present because I smelled recently burned marihuana." Observation (i.e., the smell) of recently smoked marihuana is not an observation of current possession of additional unsmoked marihuana. One might infer the presence of more marihuana, but one is not observing or smelling it and one is therefore not finding the person committing the offence of possession of additional, unsmoked, marihuana within the meaning of s. 495(1)(b). [Emphasis in original.] Section 495(1)(b) does not permit an arrest made on inference derived from the smell of burned marihuana alone. [Emphasis added.]

[14] Jackson J.A. appears to be saying that an inference drawn by the peace officer from observed facts may not be sufficient grounds to render lawful an arrest made under s. 495(1)(b) of the *Code*. She went on to say:

> [31] As I have indicated, s. 495(1)(b) does not permit an arrest based on inference, at least in these circumstances, but if I am wrong on this, I will address the Crown's alternative argument, which is that an officer is entitled to infer from the presence of the smell of burned marihuana alone that there will be more, unsmoked marihuana present. My view, formed by a review of the case law, is that the inference suggested by the Crown is not objectively reasonable.

[15] In my view, the judgment in *Janvier* seems to differ from what was said by this Court in *R. v. Webster*, 2008 BCCA 458, 238 C.C.C. (3d) 270, a case decided a year after *Janvier*. That case was however a situation, at least initially, of investigative detention. Frankel J.A. said this at para. 31 of *Webster*:

> In my view, the odour of freshly-smoked marihuana emanating from a vehicle objectively supports, at a minimum, a reasonable suspicion that the driver and/or passenger are then engaged in criminal activity, namely, possession of marihuana. It is reasonable to suspect that persons who have just used marihuana will have more of that drug in their possession. ...

[16] This Court, in the earlier case of *R. v. Dubois*, 2004 BCCA 589, 205 B.C.A.C. 156, had found an arrest legal where police officers smelled an odour of burning

marihuana coming from a vehicle and upon stopping the vehicle observed what appeared to be marihuana leaves on a passenger and in the vehicle. Huddart J.A. said at para. 9:

> [9] ... It cannot be said that the evidence of odour alone is insufficient in all circumstances to found an objective belief that a crime has been or is about to be committed. As this Court noted in *R. v. Schulz*, 2001 BCCA 601, at para. 5, each case turns on its own facts and whether the odour of marihuana will suffice to justify an arrest will depend on the surrounding circumstances. The testimony of Constable Pineo supports the trial judge's finding she had a subjective belief that she had reasonable and probable grounds for an arrest. Her inference that there would probably be marihuana in the car was reasonable.

[17] In *R. v. Schulz*, 2001 BCCA 601, 159 B.C.A.C. 146, a police officer attended a residence, rather ironically as it turned out, to return to a person some exhibits from an earlier drug investigation that had not resulted in charges. The following passage from the reasons of Donald J.A. encapsulates the facts of the case:

> [6] ...
>
> > [4] Constable Meyer attended the Schulz residence and knocked on the door. A voice from within stated "come-in", upon which Constable Meyer opened the door and observed an individual, later determined to be the accused, Mr. Schulz, seated at the table. Mrs. Schulz immediately arose and quickly came to the door and closed it behind him. Constable Meyer stated that he was able to smell burning marihuana emanating from within the residence. Constable Meyer advised the accused that he had smelled the marihuana and as a result the residence would be searched. He then arrested the accused for possession of a controlled substance. ...

[18] The conclusion of the Court as to the legality of the arrest is set forth in para. 12 of the reasons:

> [12] Much of the appellant's argument relied on cases which dealt with the smell of burnt marihuana or marihuana in a raw or some other form. However, in the instant case the trial judge found that Constable Meyer smelled <u>burning</u> marihuana in a room occupied only by the appellant. Having examined the transcript of Constable Meyer's testimony, and having considered the evidence as a whole, I think the trial judge's finding was reasonable and cannot be interfered with. The odour that the officer detected, together with the behaviour of the appellant in quickly moving to exclude the officer once the appellant saw who was at the door, combined to provide a sufficient basis for the belief founding the arrest. [Emphasis in original.]

I note the phraseology "belief founding the arrest". This language seems to me to lend

some support to the proposition that an arresting officer can rely on inferences arising from observed facts.

[19] The trial judge appeared to place considerable reliance upon the decision of this Court in *R. v. Abel and Corbett*, 2008 BCCA 54, 229 C.C.C. (3d) 465. That case raised an issue concerning the power of a citizen to arrest someone believed to have committed a crime. The appellant and a companion, one C, had attended at a residence where one H was believed to be. The appellant believed H could be in possession of a rifle stolen from the premises of the appellant about a week earlier. The appellant had learned that H had offered to sell the rifle to a third party. The appellant had information as to the whereabouts of H but no knowledge as to where the rifle might be. He decided to seek out and confront H with a view to recovering the missing rifle. He was accompanied on this mission by C who took a tire iron. An altercation occurred when they came upon H in the premises of a friend:

> [13] There are also conflicting accounts as to what happened inside the townhouse. There is, however, no dispute that a physical altercation occurred between Mr. Holl and Mr. Abel, and that Mr. Corbett hit Mr. Holl with the tire iron. It is also not disputed that Mr. Holl was overpowered and restrained using zap straps Mr. Abel had brought with him for this purpose.

[20] The appellant was convicted of assaulting H, and C was convicted of possession of a weapon for a dangerous purpose. At trial, the two accused persons had unsuccessfully sought a direction to the jury from the trial judge that when the affray had occurred, their actions were justified because they were engaged in a "citizen's arrest". This Court found the judge was correct to refuse to give such an instruction. Frankel J.A. said at para. 64:

> In this case, although Mr. Abel and Mr. Corbett reasonably believed Mr. Holl had stolen Mr. Abel's rifle, they had no information as to where the rifle might be. They certainly did not come upon Mr. Holl in possession of it. As a result, it was not open to them to seek to justify their actions on the basis that Mr. Holl was "found committing" the offence of possession of stolen property at the Corlett Street townhouse.

[21] I am not of the view that *Abel* is a particularly apposite authority to consider on the issue arising in the case at bar. The law has always sought to circumscribe within very narrow limits the powers of a citizen to effect an arrest. It is a species of self help and as the *Abel* case amply demonstrates, a fertile source of breaches of the peace. The case of *Abel* contains a useful discussion of cases such as *Biron* and *Roberge* but throws up considerations somewhat different from those pertinent to arrests made by a

peace officer.

[22] In his reasons, the judge made reference to cases such as *R. v. Ashby*, 2011 BCSC 513, where a smell of vegetative marihuana emanating from a vehicle was found to afford a proper basis for an arrest for possession of marihuana. I think it reasonable to observe that this factual situation could afford a stronger foundation for an arrest under s. 495(1)(b). That is so because the actual drug substance is being detected by olfactory means. The question in the case at bar is whether a burnt smell supports an arrest under this section.

[23] I agree with the trial judge in the instant case that the smell of burnt marihuana is an indication that some marihuana has been consumed by fire. It is clearly the situation that that particular portion of marihuana no longer exists. In the terminology of *Roberge*, what may be reasonably apparent from such an observation? I advert again to what was said by Frankel J.A. in *Webster*:

> [31] In my view, the odour of freshly-smoked marihuana emanating from a vehicle objectively supports, at a minimum, a reasonable suspicion that the driver and/or passenger are then engaged in criminal activity, namely, possession of marihuana. It is reasonable to suspect that persons who have just used marihuana will have more of that drug in their possession. ...

[24] I should note that the facts in *Webster* were more supportive of affording grounds for arrest after the stopping of the vehicle than the facts in the present case. In that case, the arresting officer had observed a vehicle and followed it. As he proceeded he detected a smell of burning marihuana and stopped the vehicle. As he stood by the vehicle, he continued to smell the burnt odour. He noted what appeared to be a joint of marihuana behind the ear of a passenger in the vehicle and in response to a question of the officer about marihuana, the passenger handed the joint to the officer. The driver and passenger were forthwith arrested for possession of a controlled substance. In a search of the vehicle, the officer discovered a plastic bag containing a considerable quantity of marihuana, a scale, zip lock baggies and a "score sheet". The men were charged with possession of the marihuana for the purpose of trafficking. After a *voir dire*, the judge found the arrest and search lawful and a conviction resulted. This Court sustained the conviction.

[25] Among the many cases cited to us, a case that demonstrates similarity to the present one is *R. v. Polashek* (1999), 45 O.R. (3d) 434, 134 C.C.C. (3d) 187 (C.A.). In that case, a police officer at a traffic stop detected a strong odour of marihuana

emanating from a vehicle. The officer could not determine whether the odour was of burnt or unburned marihuana. In response to a question, the driver asserted that there was no such smell in the vehicle. The officer said that the use of drugs was "fairly predominant" in the area and he had made many seizures of marihuana in the area. A trial judge concluded "that the officer had reasonable and probable grounds to arrest the accused for the possession of a narcotic upon smelling the strong odour of marihuana inside the vehicle."

[26] In a search incidental to the arrest of the appellant, a sufficient amount of marihuana was found in the trunk of the vehicle to support a charge of possession for the purpose of trafficking and a small amount of LSD was also found. The appellant was convicted of the offences of possession for the purpose of trafficking of marihuana and possession of LSD.

[27] The Ontario Court of Appeal allowed an appeal from conviction on the basis of a denial of the right to counsel but sustained the finding of the trial judge about the legality of the arrest. However, since the Court in its discussion used the terminology of "reasonable and probable" grounds for arrest, it seems the arrest may have been considered to have been made under s. 495(1)(a) as opposed to s. 495(1)(b).

[28] The Court did opine that such smell coupled with other circumstances could afford a proper basis for arrest. The only other relevant inculpatory circumstance I can deduce from the report was the opinion of the officer about drug usage in the area and the many previous seizures he had made. That seems generally to track what the arresting officer testified to in the present case. A possible lack of similarity of the cases is the fact that the officer in *Polashek* may have been, as he said, detecting an odour of burnt or unburned marihuana. If the latter, the circumstances would be analogous to those found to be the situation in *Ashby*.

[29] On the face of matters, there does seem to be some divergence of approach between the *Janvier* and *Webster* cases concerning what inferences may be drawn from the smell of burnt marihuana. Indeed, in *Janvier*, Jackson J.A. appears to suggest it is impermissible for an officer to rely on inference at all when making an arrest relying on s. 495(1)(b). The reasoning of the Ontario Court of Appeal in *Polashek,* however, appears to suggest that it may be possible to infer from the smell of marihuana and an officer's experience of drug seizures that a vehicle will be found to contain drugs.

[30] Ultimately, I venture to suggest that a court faced with such an issue cannot be too categorical in determining when an arrest under s. 495(1)(b) will or will not be supportable. The jurisprudence in this province seems to support the thesis that a full consideration of all relevant circumstances needs to be made by the trier of fact. Such also seems to be the case in Nova Scotia. In the case of *S.T.P v. Canada (Director of Public Prosecutions Service)*, 2009 NSCA 86, 281 N.S.R. (2d) 1, the Nova Scotia Court of Appeal upheld the legality of an arrest based on a smell of burnt marihuana, previous involvement of the vehicle in a drug case, and somewhat apprehensive behaviour by an occupant of the vehicle. M. MacDonald C.J.N.S. put it this way:

> 29 Therefore, consider this context. The officers see three young men in a vehicle and one of them appears nervous upon seeing the police vehicle. Their car then immediately turns off the road into the McDonald's parking lot. Then a computer check of the vehicle reveals "bail violations" including references to "cannabis". This would have given the officers strong reason to believe that something illicit was occurring. Then upon smelling burnt marijuana, it became apparent that the illicit activity involved the possession of marijuana. At that point, the test for a summary conviction arrest was met. Specifically, applying the three criteria noted above: (a) the officer was present when the apparent offence was taking place, (b) he detected the smell of burnt marijuana, and (c) the commission of this offence would have been "'apparent' to a reasonable person placed in the circumstances of the arresting officer at the time".
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> 30 Considering the entire context therefore, the judge did not err in finding the arrest to be lawful.

[31] If *Janvier* is taken to stand for the proposition that a police officer cannot rely on inference from observed circumstances to afford proper grounds for arrest under s. 495(1)(b), that seems not to accord with the jurisprudence in this province. The inference of course must be one that is objectively supportable to accord with what was said in cases like *Biron* and *Roberge*. If circumstances objectively support an inference that criminal activity is occurring, a court will be entitled to find justifiable an arrest made pursuant to s. 495(1)(b).

[32] Ultimately, these cases are going to be very much fact driven. While I think the learned trial judge might have expressly considered what the arresting officer said about his previous experience, I doubt that this very experienced judge overlooked this evidence. I believe the factual findings he made that the situation in the case at bar fell short of furnishing adequate grounds for an arrest under s. 495(1)(b) are ones to which this Court should give due deference. I observe that I might not be inclined to adopt the phraseology used by the trial judge about "law and logic", but would prefer to use

phraseology such as "in all the circumstances". That approach seems consistent with the jurisprudence in this province.

[33] Since this case can be seen as one near the line where different triers of fact could reach different conclusions, I am not persuaded that this appeal should succeed and accordingly I would dismiss the appeal.

"The Honourable Mr. Justice Hall"

I agree:

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Madam Justice D. Smith"