IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *R. v. Manning*, 2019 NLCA 46
Date: July 19, 2019
Docket Number: 201701H0075

BETWEEN:

HER MAJESTY THE QUEEN — APPELLANT

AND:

GERARD MANNING — RESPONDENT

Coram: Fry C.J.N.L., Hoegg and Goodridge JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 201501G0908
(2017 NLTD(G) 132)

Appeal Heard: February 18, 2019
Judgment Rendered: July 19, 2019

Reasons for Judgment by: Hoegg J.A.
Concurred in by: Fry C.J.N.L. and Goodridge J.A.

Corrected decision: The text of the original judgment was corrected on July 23, 2019. A description of the correction is appended.

Counsel for the Appellant: Dana Sullivan
Counsel for the Respondent: Derek Hogan

Hoegg J.A.:

INTRODUCTION

[1] This appeal concerns the scope of police authority to carry out their duties when responding to a 911 call. It addresses the balance to be achieved between individual liberty and the ability of the police to preserve the peace, investigate crime and protect people and property.

[2] The appellant, Gerard Manning, was charged with four counts of assault and one count of resisting arrest arising from an incident at his home. Three of the assault charges related to Mr. Manning's sister and sister-in-law, and they were withdrawn before trial. The charges of assaulting a police officer and resisting arrest proceeded to trial, but were dismissed by the Trial Judge.

[3] The Crown appealed the dismissals to the Summary Conviction Appeal Court (SCAC) and a Judge of the Supreme Court of Newfoundland and Labrador, General Division, sitting as a SCAC judge, upheld the dismissals. The Crown appealed the SCAC Judge's decision to this Court.

BACKGROUND

[4] On May 22, 2013, a dispatcher at the Royal Newfoundland Constabulary (the RNC) received a 911 call from a woman at the residence of Mr. Manning. The caller requested police assistance, saying that Mr. Manning was "out of control", "quite aggressive", and that he was going to harm himself. The call stayed open for over twenty minutes, during which time loud noise and general mayhem were recorded. The RNC dispatch ticket characterized the call as domestic.

[5] Two RNC officers, Constable Mackey and Constable Harris, responded to the call. Upon their arrival at Mr. Manning's home, the front door was ajar and screaming from inside the house could be heard. The officers entered the home and saw Mr. Manning on the hallway floor with two women sitting on him in an effort to hold him down. The two women, Mr. Manning's sister Brenda Manning and his sister-in-law Donna Manning, appeared exhausted and Brenda Manning had a bleeding lip. A kitchen chair broken into pieces and a closet door off its hinges lay on the floor by Mr. Manning's head. He smelled of alcohol.

[6] Constables Mackey and Harris took over from the women. The officers struggled to handcuff Mr. Manning and remove him from the home. Donna

Manning assisted the police in doing so. Constable Mackey testified she told Mr. Manning she was detaining him and to stop resisting. While trying to remove him from the home, Constable Harris threatened to pepper spray him if he did not stop resisting. She also told him to "fuck off". The officers dragged Mr. Manning outside and put him into the back of the police car. In the course of doing so, Mr. Manning kicked Constable Mackey's left arm and the magazine holder in her duty belt. Mr. Manning was taken to the lock-up. Charges were laid and Mr. Manning was released the next day on a recognizance.

[7] Constable Harris testified that she and Constable Mackey removed Mr. Manning from his home mostly for safety reasons – the safety of the two women, herself and the other officer, and Mr. Manning. She testified that in such situations as the one they faced, the objective is to "isolate the danger", and the safest place to bring Mr. Manning was to the rear of the police car where they could control the situation and reduce his chance of contact with anyone. Constable Harris further testified they had "to figure out what was going on."

[8] Constable Mackey testified that Mr. Manning was being detained until they figured out what was going on. She also said that they wanted to investigate one of the women's bleeding lip. The officer said "basically, when we see someone who is fighting two females we separate the individuals and try to detain the aggravated person in any situation."

[9] Donna Manning testified that she and her sister-in-law were exhausted by the time the police arrived. She said she had initially gone to Mr. Manning's home after being informed that he had "fallen off the wagon" and she was concerned he would attempt to drive while intoxicated. She said that he was very irate, extremely intoxicated, and that he was threatening to harm himself. She said she and her sister-in-law were restraining him to prevent him from leaving the house.

The Trial Decision

[10] By the time of trial it was known that Mr. Manning suffered from depression, and that he abused alcohol and drugs. It was also known that Mr. Manning had in fact attempted suicide the night following the within incident, and that the police had again been involved.

[11] The Trial Judge found that the police officers' authority for being in Mr. Manning's home terminated before they took him outside and placed him in the police car, saying:

> "… once the officers determined that the caller, Brenda Manning, was not in distress and that she and her sister had Mr. Manning under control by pinning him to the floor by sitting on him, combined with his direction to leave his home, their authority for being in his residence had terminated." (paragraph 38)

The Trial Judge also found that Constable Mackey had concluded shortly after her arrival that Mr. Manning had assaulted his sister. The Trial Judge went on to say that:

> "The officers could have retained their authority to remain in the premises if they had paid attention to the details of the 911 call and dispatch ticket. They would have been aware that Mr. Manning was in a mental health crisis. They would have known that he was threatening to harm himself. This could have permitted them to embark upon a detention under the *Mental Health Care and Treatment Act.* They failed to do so. Once their permission to be in his residence was revoked by Mr. Manning, their lawful authority ended." (paragraph 39)

[12] The Trial Judge dismissed the charges against Mr. Manning on the basis that the police officers were exceeding their lawful authority when the events giving rise to the charges occurred.

The SCAC Appeal

[13] On appeal to the SCAC, the SCAC Judge found that the Trial Judge had erred by finding that Constable Mackey had decided she had grounds to charge Mr. Manning with assault against his sister before removing him from the home as there was no evidence from which the Trial Judge could so find or infer. However, the SCAC Judge found this error was not material to the outcome of the case. The SCAC Judge also found that the Trial Judge had erred in law in holding that the police officers' authority to deal with Mr. Manning terminated upon Mr. Manning telling them to leave his home, saying that once the police "entered the premises, the police officers had a duty to locate the caller, [and] assess the situation to take further lawful action, if deemed warranted" (*R. v. Manning*, 2017 NLTD(G) 132, at paragraph 29).

[14] Notwithstanding the errors, the SCAC Judge dismissed the Crown's appeal. He stated that there was a lawful entry into Mr. Manning's home to address the 911 call, and noted that the detention of Mr. Manning was for an important public purpose – "there was a real danger that in his state of intoxication and mental agitation he might pose a danger to himself". He did not accept the Crown's argument that the two women at Mr. Manning's home were in distress, notwithstanding their frantic call to the RNC for assistance,

their serious concern that Mr. Manning would leave his home in his intoxicated and agitated state, their continued restraint of him, and their obvious state of exhaustion. He concluded that interference with Mr. Manning's liberty through detention was "not necessary for the performance of the police duty to the public good" (at paragraph 46). The SCAC Judge concluded that the police exceeded their lawful authority when they forcibly removed Mr. Manning from his home and detained him.

[15] The SCAC Judge also said that the detention of Mr. Manning was not justified as an investigative detention because there was no clear nexus between Mr. Manning and a recent or on-going criminal offence, although his detention would have been lawful if effected pursuant to the *Mental Health Care and Treatment Act* (at paragraph 49).

[16] The Crown appeals the SCAC Judge's decision to this Court.

ISSUES

[17] The central issue is whether RNC officers Mackey and Harris were lawfully executing their duties when they removed Mr. Manning from his home and detained him.

[18] Mr. Manning defended himself at trial by alleging that Constables Mackey and Harris were not acting in the lawful execution of their duty when the events giving rise to the charges arose. He did not argue that his section 9 *Charter* right to be free from arbitrary detention was violated. The law respecting section 9 of the *Charter*, which focuses on detention for investigative purposes in consideration of whether the detention is arbitrary, overlaps with the law respecting whether police are lawfully executing their duties under the common law when they detain for investigative purposes. The SCAC Judge ruled that the officers had no grounds to detain Mr. Manning, effectively focusing on section 9 *Charter* law respecting investigative detention. The Crown appeals the Judge's ruling that there were no grounds for the police to detain Mr. Manning.

[19] The Crown also appeals the SCAC Judge's ruling that the officers had the option to detain Mr. Manning under the *Mental Health Care and Treatment Act*, S.N.L. 2006, c. M-9.1, had they invoked its provisions.

LEAVE TO APPEAL

[20] Section 839(1) of the *Criminal Code* stipulates that appeals from the decision of a SCAC Judge to this Court can be taken only on a question of law alone. This Court has ruled that the ground of appeal must have a reasonable possibility of success or the proposed question of law has significance to the administration of justice (*R. v. Barry,* 2019 NLCA 8, at para. 6).

[21] The parties agree that the scope of police authority to detain persons when carrying out their duties in response to 911 or other emergency calls is a question of law significant to the administration of justice. I agree. Accordingly, leave is granted.

ANALYSIS

The Law of Investigative Detention

[22] In *R. v. Mann,* 2004 SCC 52, [2004] 3 S.C.R. 59, the Supreme Court of Canada considered the grounds police must have to detain persons for investigative purposes and survive *Charter* scrutiny. In *Mann,* police were advised of a recent break and enter and provided with a description of the suspect. They saw Mr. Mann in the vicinity of the crime and he matched the description, so they detained and searched him, finding drugs on his person. Mr. Mann was subsequently charged with drug trafficking. He maintained that his section 8 *Charter* right to be secure from unreasonable search and seizure and his section 9 *Charter* right not to be arbitrarily detained were violated because police had no grounds to detain or search him before laying the drug trafficking charge.

[23] The Supreme Court of Canada ruled that the police had grounds to detain Mr. Mann for investigative purposes because he matched the description given to them by dispatch and because he was apprehended near the scene of the recent crime. Iacobucci J. described the detention issue at paragraph 16 of the judgment:

> … Given their mandate to investigate crime and keep the peace, police officers must be empowered to respond quickly, effectively, and flexibly to the diversity of encounters experienced daily on the front lines of policing. Despite there being no formal consensus about the existence of a police power to detain for investigative purposes, several commentators note its long-standing use in Canadian policing practice. …

[24] Justice Iacobucci went on to state that Canadian jurisprudence recognized the common law power of police to detain for investigation purposes. In so concluding, he relied on the principles set out in *R. v. Waterfield*, [1964] 1 Q.B. 164 and adopted by the Supreme Court of Canada in *R. v. Dedman,* [1985] 2 S.C.R. 2, saying at paragraph 34:

> … The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference. …

[25] *Dedman* therefore clarified that police officers have common law powers to "preserve the peace, prevent crimes, and protect life and property" (at pages 11-12).

[26] Justice Iacobucci concluded his section 9 analysis at paragraph 35:

> Police powers and police duties are not necessarily correlative. While the police have a common law duty to investigate crime, they are not empowered to undertake any and all action in the exercise of that duty. Individual liberty interests are fundamental to the Canadian constitutional order. Consequently, any intrusion upon them must not be taken lightly and, as a result, police officers do not have *carte blanche* to detain. The power to detain cannot be exercised on the basis of a hunch, nor can it become a *de facto* arrest.

[27] The *Mann* Court described the question to be answered when illegal detention is asserted as whether police were acting in the lawful execution of their duties when they carried out the impugned action. Justice Iacobucci stated the approach to resolving the question is to first determine "what the police constable was actually doing and in particular whether such conduct was *prima facie* an unlawful interference with a person's liberty or property", and then to determine "whether (a) such conduct falls within the general scope of *any duty* imposed by statute or recognized at common law and (b) whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty" (at paragraph 24). Whether it was necessary to interfere with liberty to carry out the particular police duty and whether it was reasonable to do so considering the nature of the liberty interfered with and the

importance of the public purpose served by the interference inform resolution of the ultimate question (*Mann,* at paragraph 26). In the result, the detention must be found to be reasonably necessary on an objective view of the circumstances which inform the police officer's suspicion that there is a clear nexus between the individual to be detained and a recent or ongoing criminal offence. The *Mann* test has become known as the reasonable suspicion test. If the test is met by the Crown, there is no breach of an accused's section 9 *Charter* right.

[28] Before *Mann* was decided, the Supreme Court of Canada considered whether there was a general police power to detain for investigative purposes in circumstances where police did not have reasonable grounds to believe that an offence had been or was being committed. That issue presented in *R. v. Godoy* (1998), [1999] 1 S.C.R. 311 in the context of police response to a 911 call. In *Godoy*, police had forcibly entered a private residence to investigate a disconnected 911 call. In the course of the entry, Mr. Godoy, who was trying to prevent police from entering his home, broke an officer's finger. He was charged with assault, and argued at trial that the forced entry by police was unlawful, and therefore his subsequent arrest and charge for assaulting his wife were illegal.

[29] The Provincial Court dismissed the charge against Mr. Godoy, but the Crown's appeal to the Ontario Superior Court was allowed, and a new trial was ordered. Mr. Godoy's appeal to the Ontario Court of Appeal was dismissed. He further appealed to the Supreme Court of Canada which upheld the appellate court's decision. In so doing, Lamer C.J. reached back to *Waterfield* and *Dedman* for the applicable principles, saying:

> 11 In my view, public policy clearly requires that the police *ab initio* have the authority to investigate 911 calls, but whether they may enter dwelling houses in the course of such an investigation depends on the circumstances of each case.
>
> …
>
> 15 In *Dedman, supra*, at pp. 11-12, this Court held that the common law duties of the police (statutorily incorporated in s. 42(3)) include the "preservation of the peace, the prevention of crime, and the protection of life and property" (emphasis added). As Finlayson J.A. noted in the Court of Appeal, the common law duties of the police have yet to be judicially circumscribed. Furthermore, the duty to protect life is a "general duty" as described by Finlayson J.A., and is thus not limited to protecting the lives of victims of crime.
>
> 16 A 911 call is a distress call -- a cry for help. It may indeed be precipitated by criminal events, but criminal activity is not a prerequisite for assistance. The duties

> specifically enumerated in s. 42(1) of the Act may or may not be engaged. The point of the 911 emergency response system is to provide whatever assistance is required under the circumstances of the call. In the context of a disconnected 911 call, the nature of the distress is unknown. However, in my view, it is reasonable, indeed imperative, that the police assume that the caller is in some distress and requires immediate assistance. To act otherwise would seriously impair the effectiveness of the system and undermine its very purpose. The police duty to protect life is therefore engaged whenever it can be inferred that the 911 caller is or may be in some distress, including cases where the call is disconnected before the nature of the emergency can be determined.
>
> …
>
> 22 Thus in my view, the importance of the police duty to protect life warrants and justifies a forced entry into a dwelling in order to ascertain the health and safety of a 911 caller. The public interest in maintaining an effective emergency response system is obvious and significant enough to merit some intrusion on a resident's privacy interest. However, I emphasize that the intrusion must be limited to the protection of life and safety. The police have authority to investigate the 911 call and, in particular, to locate the caller and determine his or her reasons for making the call and provide such assistance as may be required. …
>
> (Emphasis added.)

Chief Justice Lamer concluded at paragraph 28:

> In summary, emergency response systems are established by municipalities to provide effective and immediate assistance to citizens in need. The 911 system is promoted as a system available to handle all manner of crises, including situations which have no criminal involvement whatsoever. When the police are dispatched to aid a 911 caller, they are carrying out their duty to protect life and prevent serious injury. …

[30] The general common law power of police to detain was again considered in *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725. *Clayton* involved police response to a 911 call which reported that "four black males were flaunting their handguns in front of a strip club". The police set up a roadblock where they identified, detained, and subsequently searched Mr. Clayton (and others) to investigate the complaint. Firearms were found and charges were laid. Mr. Clayton argued that his charges should be dismissed because his detention for investigative purposes and the search of his person were in violation of his sections 8 and 9 *Charter* rights.

[31] The Supreme Court of Canada concluded that the initial and continuing detention of Mr. Clayton were justified based on the information the police had,

the nature of the offence alleged, and the timing and location of the detention. In so concluding, the *Clayton* Court accepted that police had the common law power to detain for investigative purposes (at paragraphs 22, 27 and 30). At paragraph 31, Abella J. stated that the ultimate question to be resolved in such a case is the lawfulness of such a detention, and set out the considerations as follows:

> The determination will focus on the nature of the situation, including the seriousness of the offence, as well as on the information known to the police about the suspect or the crime, and the extent to which the detention was reasonably responsive or tailored to these circumstances, including its geographic and temporal scope. This means balancing the seriousness of the risk to public or individual safety with the liberty interests of members of the public to determine whether, given the extent of the risk, the nature of the stop is no more intrusive of liberty interests than is reasonably necessary to address the risk.

[32] In *R. v. Aucoin*, 2012 SCC 66, at paragraph 36, the Supreme Court of Canada set to rest the question of whether the common law empowered police to detain for investigative purposes, saying:

> The existence of a general common law power to detain where it is reasonably necessary in the totality of the circumstances was settled in *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725. That case moved our jurisprudence from debating the existence of such a power to considering whether its exercise was reasonably necessary in the circumstances of a particular case. …

[33] Some of the above-mentioned cases, and other cases such as *R. v. MacDonald*, 2014 SCC 3, extend the common law powers of police to detain to the power to search persons detained, thereby informing interpretation of the section 8 *Charter* right to be secure against unreasonable search and seizure. While this case did not involve a search of Mr. Manning, the factors for consideration in balancing police duties with interference of a person's liberty in the context of section 8 as set out at paragraph 37 of *MacDonald* are also factors worth considering in determining whether a detention for investigative purposes is appropriate. They are:

1. the importance of the performance of the duty to the public good (*Mann*, at para. 39);

2. the necessity of the interference with individual liberty for the performance of the duty (*Dedman*, at p. 35; *Clayton*, at paras. 21, 26 and 31); and

3. the extent of the interference with individual liberty (*Dedman*, at p. 35).

[34] The *MacDonald* Court explained (at paragraph 39) why consideration of each of these factors assists in determining the existence of the police power and defining its limits:

> 1. Importance of the duty: No one can reasonably dispute that the duty to protect life and safety is of the utmost importance to the public good and that, in some circumstances, some interference with individual liberty is necessary to carry out that duty.
>
> 2. Necessity of the infringement for the performance of the duty: When the performance of a police duty requires an officer to interact with an individual who they have reasonable grounds to believe is armed and dangerous, an infringement on individual liberty may be necessary.
>
> 3. Extent of the infringement: The infringement on individual liberty will be justified only to the extent that it is necessary to search for weapons. Although the specific manner (be it a pat-down, the shining of a flashlight or, as in this case, the further opening of a door) in which a safety search is conducted will vary from case to case, such a search will be lawful only if all aspects of the search serve a protective function.

[35] The Supreme Court of Canada decision in *R. v. Cornell*, 2010 SCC 31 is relevant to determining whether police actions are lawful. *Cornell* involved an unannounced "hard" entry into an accused's dwelling to search for cocaine pursuant to a drug trafficking investigation. Mr. Cornell argued that the search was unreasonable and in breach of his sections 8 and 9 *Charter* rights. The Court ultimately ruled that the detention and search were not unreasonable in the circumstances. Cromwell J.'s words of caution at paragraphs 23-24 pertain:

> [23] First, the decision by the police must be judged by what was or should reasonably have been known to them at the time, not in light of how things turned out to be. …
>
> [24] Second, the police must be allowed a certain amount of latitude in the manner in which they decide to enter premises. They cannot be expected to measure in advance with nuanced precision the amount of force the situation will require: *R. v. Asante-Mensah*, 2003 SCC 38, [2003] 2 S.C.R. 3, at para. 73; *Crampton*, at para. 45. It is often said of security measures that, if something happens, the measures were inadequate but that if nothing happens, they were excessive. These sorts of after-the-fact assessments are unfair and inappropriate when applied to situations like this where the officers must exercise discretion and judgment in difficult and fluid circumstances. The role of the reviewing court in assessing the manner in which a search has been conducted is to appropriately balance the rights of suspects with the requirements of safe and effective law enforcement, not to become a Monday morning quarterback.

[36] This Court had occasion to consider the legality of an investigative detention in *R. v. Squires*, 2016 NLCA 54. In *Squires*, Green C.J.N.L. noted "it must be recognized that there may be good practical reasons to allow police, where safety issues are at play, to carry out investigative detentions (tailored in their nature to the factual circumstances)" and said "it is the duty of a police officer to investigate potential crimes and to ask questions of citizens in relation to that investigation" (at paragraphs 11 and 18).

[37] I also note the Ontario Court of Appeal decision in *R. v. Golub* (1997), 34 O.R. (3d) 743 (Ont. C.A.), wherein the Court stated that the justifiability of an officer's conduct must always be measured by the realities of the situation in which they find themselves (at paragraph 44).

[38] The powers and duties of police in this province are set out in legislation. Section 8(1) of the *Royal Newfoundland Constabulary Act*, S.N.L. 1992, c. R-17 lists the duties of a police officer:

> (a) Preserving the peace;
> (b) Preventing crimes and other offences and providing assistance and encouragement to other persons in their prevention;
> (c) assisting victims of crime;
> (d) apprehending criminals and other offenders and persons who may lawfully be taken into custody;
> (e) laying charges, prosecuting and participating in prosecutions;
> (f) executing warrants that are to be executed by police officers and performing related duties;
> (g) obeying constabulary regulations, orders and rules respecting policy and procedures; and
> (h) performing the lawful duties assigned to him or her.

In addition, section 8(3) of the *Royal Newfoundland Constabulary Act* provides that police officers have "the powers and duties assigned to a constable at common law".

Application of the Law to this Case

Did the SCAC Judge err in ruling that the police did not have sufficient grounds to detain Mr. Manning for investigative purposes?

[39] The issue in this case is whether the police were acting in the lawful execution of their duties in detaining Mr. Manning. It is not whether Mr. Manning's section 9 *Charter* right was violated. Nevertheless, any exercise of police power must be compliant with the *Charter* even if a *Charter* violation is

not argued. As noted in paragraph 17 above, there is conceptual overlap in the jurisprudence between detention for investigative purposes under the common law and the right not to be arbitrarily detained under section 9 of the *Charter*. In this case, in ruling that the police had insufficient grounds to detain Mr. Manning for investigative purposes, the SCAC Judge reasoned that no recent or on-going criminal offence had been alleged or witnessed by the police and that therefore no nexus between a criminal offence and Mr. Manning had been established. This reasoning language comes from the section 9 *Charter* analysis set out in *Mann*, and shows the overlap referenced above. Because police actions must be *Charter* compliant, I will address whether the officers had grounds to detain Mr. Manning in the context of section 9 of the *Charter*.

[40] Whether Mr. Manning's detention was arbitrary within the meaning of section 9 of the *Charter* depends on whether the reasonable suspicion standard is met. This requires establishing a "clear nexus between the individual to be detained and a recent or on-going criminal offence" (*Mann*, at paragraph 34) and an assessment of the overall reasonableness of the detention based on an objective view of the presenting circumstances.

[41] In this case the police were responding to a 911 call for assistance having been informed that Mr. Manning was "quite aggressive", "intoxicated", and "out of control". When they arrived, they saw two women physically restraining Mr. Manning by sitting on him amid broken furniture, and that one of the women had a fresh cut on her lip. It was obvious that Mr. Manning was intoxicated and agitated. The Trial Judge stated that he was hysterical.

[42] Donna Manning testified at trial. She said that she and her sister wanted the police to take Mr. Manning away to a place where he would be safe and that she assisted the officers in restraining Mr. Manning and removing him from his home.

[43] The standard to be met by the police officers in order to detain Mr. Manning for investigative purposes in accordance with section 9 of the *Charter* is the reasonable suspicion standard. This standard is low, lower than the standard of reasonable grounds to believe which is required to lay a charge. It is generally applied in fluid circumstances, and it does not require proof that a crime was or is being committed.

[44] The state of mayhem in the house, the fresh cut on Ms. Manning's lip, and the fact that there were two women sitting on Mr. Manning, to my mind are circumstances that show a nexus between Mr. Manning and the offence, past or

ongoing, of assault. The SCAC Judge's reasoning that there was no nexus between Mr. Manning and a recent or on-going criminal offence seems to have been based on the notion that broken furniture in the home and the cut on Brenda Manning's lip could have been caused in any number of ways. This reasoning is more akin to application of the reasonable grounds to believe standard, or the standard of reasonable doubt in determining guilt, rather than the reasonable suspicion standard justifying investigative detention.

[45] In this regard, I note that while assault charges respecting Brenda and Donna Manning were withdrawn before trial, it has to be presumed that these charges were laid on reasonable and probable grounds. It is not unusual that charges involving family members are withdrawn after crises have been averted. Donna Manning testified at trial that Mr. Manning had not assaulted her. When she was asked in cross-examination whether she would be surprised to learn that Brenda Manning had given a statement that Mr. Manning had assaulted her (Brenda Manning) with a door, Donna Manning answered that she could not comment on what somebody else said.

[46] In my view, the reasonable suspicion standard was met by the circumstances which confronted the officers at Mr. Manning's home. The officers would have had grounds to *suspect* that the woman with the freshly bloodied lip had been assaulted or even that the two women were assaulting Mr. Manning by holding him down. The aggressiveness complained of in the 911 call and the broken furniture also serve to support reasonable suspicion of criminal conduct. In the result, the general chaos of the situation and the women's concern that Mr. Manning would leave his home in his state of intoxication and agitation are circumstances that make his detention overall reasonable. Accordingly, I do not see a violation of Mr. Manning's section 9 right.

[47] Accordingly, the SCAC Judge erred in law in ruling that there was no clear nexus between Mr. Manning and a past or ongoing criminal offence and also by failing to assess the overall circumstances of the situation to determine whether the police actions in detaining Mr. Manning were reasonably necessary.

Were Constables Mackey and Harris acting in the lawful execution of their duties when they removed Mr. Manning from his home and detained him?

[48] Constables Mackey and Harris were responding to a 911 call. The parties agree, as did the SCAC Judge, that upon the officers' arrival at Mr. Manning's home, they had authority to enter and assess the situation in furtherance of their

duty to determine what prompted the 911 call (*Godoy* at paragraph 22). (See also *R. v. Nicholls* (1999), 28 C.R. (5th) 180 at paras. 10-13.)

[49] While the SCAC Judge acknowledged that the officers had a duty to enter Mr. Manning's home to assess the situation, he ruled that they exceeded their authority in removing and detaining Mr. Manning. In so ruling, the SCAC Judge did not identify the point when the officers lost their authority to act. One can only conclude that the SCAC Judge decided that at some point the officers had to leave Mr. Manning in his home with the two women.

[50] The dispatch ticket given to the officers noted that Mr. Manning had indicated he was going to harm himself. This fact was also communicated to the police officers by Donna Manning. The fact that Mr. Manning was threatening to harm himself indicated that he may have had a mental health problem. However, this was only one of several factors presenting to the officers and informing their actions on May 22, 2013. Severe intoxication, aggressiveness, and fear that Mr. Manning was going to drive or otherwise leave his home in his intoxicated and agitated state were also presenting. Also relevant is that the evidence was that officers Mackey and Harris could not recall having any knowledge that Mr. Manning had a mental health history.

[51] It does not take much imagination to envision what could have happened had the police officers not removed Mr. Manning from his home and detained him overnight. It is clear from the record that the Manning women were in distress when the police arrived and that the concerns which prompted the 911 call had not abated, nor was the situation under any kind of control until Mr. Manning was handcuffed and removed. In fact, the Manning women assisted the police with removing Mr. Manning from his home believing that he would be taken somewhere where he would be safe. Had the police just left the home, as was suggested by the Trial Judge and as seems to be suggested by the SCAC Judge, the officers would have been leaving the very situation that prompted the 911 call. To my mind the officers would have been derelict in their duty to have left Mr. Manning in his highly intoxicated, aggressive, and agitated state, especially when it was not what the women wanted or needed. In fact, Mr. Manning was kept safe at the lock-up, and released in the morning, presumably sober.

[52] In my view, the officers' removal of Mr. Manning to the police car and their further detention of him was an appropriate response to the 911 call and the situation that confronted them at Mr. Manning's home. I would also note that

criminal activity is not a prerequisite for police assistance (*Godoy,* at paragraph 11).

The Mental Health Care and Treatment Act

[53] The SCAC Judge suggested that the proper course of action would have been for the officers to have invoked the provisions of the *Mental Health Care and Treatment Act* and taken Mr. Manning to be assessed for his mental health condition, presumably to a hospital. He said that they would have had the authority to do so had they invoked the provisions of the *Mental Health Care and Treatment Act*. I do not disagree that Mr. Manning may have needed a mental health assessment following the events at his home on May 22, 2013. However, I am dubious that it would have been appropriate for the police to have invoked the provisions of the *Mental Health Care and Treatment Act* and taken him directly to a mental health facility given Mr. Manning's highly intoxicated state or that such action would have resulted in any evaluation at that time.

[54] Certain requirements must be met when a person is being detained under the provisions of the *Mental Health Care and Treatment Act.* Section 10 requires that police must advise a prospective detainee of the reasons for detention, that he or she is being taken for an involuntary psychiatric assessment, and that he or she has the right to retain and consult with counsel without delay. It does not appear from the record that Mr. Manning was in any condition to receive such information when he was removed from his home and detained on May 22, 2013. In fact, Donna Manning testified that Mr. Manning was "in such a state" that he would not have comprehended any explanation from the officers. In any event, factors like severe intoxication and aggressiveness were in play, which suggest that Mr. Manning's mental health may not have been the foremost consideration in the minds of the officers. What was known and appreciated on the night in question is what informs the reasonableness and propriety of the officer's actions, not what was known and appreciated at the time of trial (*Cornell,* at paragraph 23).

[55] In this case, it was important for the police to respond to and appropriately handle the 911 distress call. In the circumstances, it was necessary to remove Mr. Manning from his home and detain him in order to protect the two women, to prevent Mr. Manning from driving while in an intoxicated state, and to protect Mr. Manning from himself. The conduct of Constables MacKey and Harris was in accordance with their common law duty to protect the lives and

safety of the two women and Mr. Manning. They were lawfully executing their duties when they removed Mr. Manning from his home and detained him.

[56] A similar conclusion on a somewhat similar factual situation was reached by the Manitoba Court of Appeal in *R. v. Alexson*, 2015 MBCA 5. In *Alexson*, police arrived at the Alexson home in response to a 911 hang-up call. They saw and heard Mr. Alexson screaming at a woman, whom the police later learned was his wife, and a child. The police observed the woman and child clinging to each other and concluded that they were fearful of the man. After police banged on the door, the wife let the police into the home and implored the officers to "take him away" (at paragraph 3). After entering the home, the officers concluded that Mr. Alexson was likely intoxicated. Mr. Alexson became verbally abusive to both the police and his wife and after repeated attempts to calm him down, he clenched his fists and took a fighting stance against the officers. The police determined that intervention was necessary due to safety concerns for the woman, child, and the officers themselves. Mr. Alexson was removed from the home and while the police attempted to place him in the back of the police cruiser, Mr. Alexson kicked one of the officers in the jaw with his steel-toed boot. He was charged with assaulting a police officer, but was acquitted by the trial judge who concluded the police had not been acting in the execution of their duties when they removed him from the home because the evidence did not establish that an assault was about to be committed before the police detained him.

[57] The Manitoba Court of Appeal allowed the Crown appeal, ruling that the officers clearly had the authority to enter the home to investigate the 911 call. In deciding whether Mr. Alexson's removal was "reasonably necessary", the Court stated that the justifiability of officers' conduct must always be measured against the unpredictability of situations they encounter, and their assessment of whether belligerent or intoxicated persons might harm other people in the household, the officers, or themselves is an exercise of discretion that is often guided by their experience (at paragraph 20). The appellate Court determined that the detention and arrest of Mr. Alexson were reasonably necessary in the circumstances, and further concluded that the evidence supported the officer's subjective belief that Mr. Alexson was about to commit an assault on either the wife or the child.

[58] The SCAC Judge contrasted the facts of this case with the facts in *Alexson*, saying that Mr. Alexson had been detained under intoxicated persons legislation. However, the Manitoba Court of Appeal did not address such legislation in *Alexson.* Rather, the appellate Court decided the case on the basis

of the common law duties of police when responding to a 911 call. I note that in this province such legislation (*Detention of Intoxicated Persons Act,* R.S.N.L. 1990, c. D-21) applies only when an intoxicated person is in a public place (section 4).

[59] Something more must be said. The police were called to Mr. Manning's residence again the following night. The Trial Judge contrasted the police response to the distress call on the following night with the response of Constables Mackey and Harris on May 22, 2013 and the SCAC Judge spent several paragraphs in his decision describing the events of May 23, 2013.

[60] Of course what happened on the second night is irrelevant to whether Constable Mackey and Constable Harris were lawfully executing their duties on May 22, 2013. That said, I am compelled to point out that the two situations are hardly comparable. On the second night, Mr. Manning was discovered by a relative in the process of attempting to hang himself. When the police arrived at Mr. Manning's home, family members and medical personnel were already there. The attending police officers were also aware of what had transpired the night before. Mr. Manning was agitated and hysterical, and was being restrained by medics. The Trial Judge emphasized that one of the police officers spoke softly to Mr. Manning saying he was there to help him, whereas Constable Mackey and Constable Harris had not been so gentle. I note that the officer's gentle approach on the second night caused Mr. Manning to calm down for only a few seconds before he reverted to his hysterical and agitated behaviour. At that point, medical personnel injected Mr. Manning with a sedative, which calmed and sedated him so that the authorities were able to remove him from his residence without resistance.

[61] The situation which confronted the officers on May 23, 2013 was a very different situation than the one that confronted Constable Mackey and Constable Harris on May 22, 2013. The police officers who answered the call to the Manning house on the second night had the benefit of much more information about Mr. Manning's mental health, including a freshly aborted suicide attempt as well as information as to what had transpired the previous night. More importantly, they did not have to forcibly detain Mr. Manning, because medical personnel controlled his behaviour by injecting him with a sedative. After sedation, it was most unlikely that Mr. Manning would have resisted arrest or assaulted anyone. That said, this judgment must not be taken as condoning the use of profanity by police officers in the course of doing their work (see paragraph 6 above).

DISPOSITION

[62] In *R. v. McCrea*, 2013 SCC 68 the Supreme Court of Canada ruled that in order for the Crown to successfully appeal an acquittal, the Crown must establish that the legal errors of the lower court must reasonably be thought, in the concrete reality of the case, to have had material bearing on the acquittal. In this case the SCAC Judge's legal error in finding that the officers were not acting in the lawful execution of their duties when they detained Mr. Manning had a material bearing on his decision to dismiss the appeal. Accordingly, the SCAC Judge erred in dismissing the Crown's appeal. I would allow it for the reasons stated above.

[63] The question now becomes whether this Court ought to accede to the Crown's original request and send the matter back to Provincial Court for a new trial.

[64] Section 686(4) of the *Code* provides for various remedies an appeal court can grant when allowing an appeal. One of these remedies is to allow the appeal, enter a guilty verdict, and impose a sentence that is warranted in law (section 684(4)(b)(ii)).

[65] In this case the evidence of Mr. Manning's assault on Constable Mackey and his resistance of the two officers was uncontradicted. In such a situation, an appellate court may enter a guilty finding and impose an appropriate sentence (*R. v. Cassidy*, [1989] 2 S.C.R. 345, 61 D.L.R. (4th) 480 (S.C.C.) and more recently *R. v. Riesberry*, 2015 SCC 65, [2015] 3 S.C.R. 1167 (S.C.C.)). See also *R. v. Boutcher*, 2001 NFCA 33 (Nfld. C.A.).

[66] In the circumstances of this case, which are sad at best, I would enter a finding of guilt on the two charges against Mr. Manning and discharge him absolutely. This option was discussed with both Crown and defence counsel at the conclusion of the appeal and both were in agreement with this result.

L. R. Hoegg J.A.

I concur: _____

D. E. Fry C.J.N.L.

I concur: _____

W. H. Goodridge J.A.

Correction Notice:

Correction made on July 23, 2019:

1. On page 6, paragraph 20 the second sentence originally read:

> … This Court has ruled that such a question of law must have significance to the administration of justice in order for leave to be granted (*R. v. Jerrett,* 2017 NLCA 65, at para. 6).

And has been corrected to read:

> … This Court has ruled that the ground of appeal must have a reasonable possibility of success or the proposed question of law has significance to the administration of justice (*R. v. Barry,* 2019 NLCA 8, at para. 6).