IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N :

	)	***J. F. Rogala***
HER MAJESTY THE QUEEN	)	*for the Applicant*
	)	
(Respondent) Respondent	)	***A. C. Bergen***
	)	*for the Respondent*
- and -	)	
	)	*Chambers motion heard:*
W. E. Q. S.	)	***May 17, 2018***
	)	
(Young Person) (Appellant) Applicant	)	*Decision pronounced:*
	)	***October 18, 2018***

NOTICE OF RESTRICTION ON PUBLICATION: No one may publish any information that could identify a person as having been dealt with under the *Youth Criminal Justice Act* (see section 110(1)).

On appeal from 2018 MBQB 51

STEEL JA

[1] This is a motion for leave to appeal for a second-level appeal. The summary conviction appeal judge (SCA judge) dismissed the young person's appeal of his conviction and sentence for two counts of carrying a concealed weapon and one count of unauthorized possession of a prohibited weapon. He was sentenced to twelve months of supervised probation and a two-year weapon prohibition.

FACTS

[2] In November 2015, an individual reported to 911 that he saw a young male on a bandstand stage in a public area, playing with a knife that

had a 12-inch blade. The young male was cutting up hay bales with the knife and flipping it about. He was not brandishing it or threatening anyone. The witness stated that there were four other people on the stage, but the young male did not appear to be interacting with them. The witness described the young male's location, appearance and clothing in detail, the fact that he had a black backpack and a bicycle on the stage near him and the fact that he had seen the same young male take air pellet handguns out of the same black backpack 48 hours earlier, although no guns were seen on the day the 911 call was made.

[3] Two police officers received that information from 911 dispatch. The call was designated as priority two, which meant that it was a high-priority call because an incident was in progress. They arrived on the scene within 10 minutes of receiving the call and saw the 17-year-old young person, who met the witness's description of the young male, standing in the middle of the stage, close to a black backpack and a bicycle. No knife was in sight.

[4] Constable Lecocq approached the young person and advised him that he was there because someone had called in to say that he had a large knife in his possession and that he was seen with some firearms at an earlier date. Constable Lecocq then advised the young person that he was under arrest for "weapons-related offences."

[5] The young person and the black backpack were searched. A folding pocketknife was located in the young person's front right pant pocket. Numerous knives, a collapsible baton, brass knuckles and two air pellet handguns were found in the black backpack.

[6] At trial, Cst. Lecocq testified that he believed he had reasonable grounds for arrest because the young person clearly matched the description of the perpetrator given by the witness and was reported to be in possession of a knife with a 12-inch blade. He stated that, in his experience, unless displayed for decorative purposes, the only use of such a knife was as a weapon, and that there had been mention of firearms being in a similar backpack on a previous date. He noted in cross-examination that the young person's actions on the stage had caused the witness enough concern to call the police.

[7] At the *voir dire*, the young person argued that his rights under sections 8 and 9 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) were violated when the officers searched his person and his backpack. The trial judge held that the warrantless search was subjectively and objectively reasonable and did not offend the young person's *Charter* protected right to be free from unreasonable search and seizure. She held that, even if she were wrong, she would have admitted the evidence pursuant to section 24(2) of the *Charter*. She also concluded that the knife and items in the backpack were weapons.

[8] On appeal, the young person argued the same grounds, but also argued that the trial judge erred in finding that the knives, brass knuckles, baton and air pellet handguns were weapons within the meaning of section 2 of the *Criminal Code* (the *Code*). He also appealed his sentence, arguing that a period of probation was harsh and excessive.

[9] The SCA judge found that Cst. Lecocq did not have a precise offence in his mind when he arrested the young person. However, she further

found that he understood that something not inherently a weapon could amount to one depending on the circumstances, that he did not need to have a specific offence in mind in order to have a subjective belief on reasonable grounds that an indictable offence had been committed and, therefore, that he could arrest the young person without a warrant. In addition, based on the fact that police had received a very specific and detailed complaint from an identified witness and that they were able to corroborate much of the witness's information by their own observations, she held that there were objectively reasonable grounds to arrest.

[10] The young person argues that the SCA judge erred by concluding that an officer does not need to have a specific offence in mind in order to have a subjective belief on reasonable grounds that an indictable offence has been committed. He argues that the police were required to articulate the precise offence for which they were arresting the young person since they were only entitled to arrest without warrant if they reasonably believed the young person was committing, or had committed, an indictable offence. Otherwise, for a summary conviction offence, there was no authority to arrest on reasonable grounds. He also submits that the SCA judge erred by finding that Cst. Lecocq had objectively reasonable grounds to arrest without a warrant. Last, he argues that the SCA judge also erred in finding that, if there was a *Charter* breach, the evidence would not have been excluded under section 24(2) of the *Charter*.

[11] The Crown contends that the law relating to arrest pursuant to section 495 of the *Code* is well settled and there is no error of law nor anything significant about this case that justifies a further appeal.

DECISION

Standard of Review

[12] The criteria for granting leave to appeal from a summary conviction appeal is well-known and is set out in section 839 of the *Code* and the jurisprudence interpreting that section. As explained in *R v McCorriston (GJ)*, 2010 MBCA 3 at para 16, they are as follows:

1. Any ground of appeal must involve a question of law alone.

2. The question of law should raise an arguable case of substance.

3. The arguable case must be of sufficient importance to merit the attention of the full court. Since this is a second-level appeal, there should be a compelling reason to allow this second level of appeal; a reason such as a matter that is significant to the administration of justice or the development of the law beyond this case (see *R v Denys (CD)*, 2009 MBCA 39).

[13] As stated by Chartier JA (as he then was) in *R v Forsythe (JR)*, 2009 MBCA 62 (at para 3):

> [A]n application for leave under s. 839 should be granted sparingly and with good reason. This case has already been reviewed by a judge of the Court of Queen's Bench, which is the primary appellate court to review such matters. . . . [W]hen considering a s. 839 chambers leave application, "[t]he policy of the law is clearly to discourage second-level appeals in the absence of some compelling reason to conclude otherwise".

Arrest Without Warrant—Was the Arrest Lawful

[14] When an accused challenges the validity of a warrantless arrest, the burden is on the Crown to show that the arrest was made in accordance with section 495(1) of the *Code*.

[15] Section 495(1) of the *Code* states as follows:

> **Arrest without warrant by peace officer**
> **495(1)** A peace officer may arrest without warrant
>
> > **(a)** a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;
> >
> > **(b)** a person whom he finds committing a criminal offence; or
> >
> > **(c)** a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.

[16] In *The Queen v Biron*, [1976] 2 SCR 56, Martland J, for the majority of the Supreme Court of Canada, considered sections 495(1)(a) and (b) (then sections 450(1)(a) and (b)), and stated (at pp 71-72):

> Paragraph (a) of s. 450(1) permits a peace officer to arrest without a warrant:
>
> > (*a*) a person who has committed an indictable offence or who, on reasonable and probable grounds, he believes has committed or is about to commit an indictable offence,
>
> This paragraph, limited in its application to indictable offences, deals with the situation in which an offence has already been committed or is expected to be committed. The peace officer is not present at its commission. He may have to rely upon

> information received from others. The paragraph therefore enables him to act on his belief, if based on reasonable and probable grounds.
>
> Paragraph (*b*) applies in relation to any criminal offence and it deals with the situation in which the peace officer himself finds an offence being committed. His power to arrest is based upon his own observation. Because it is based on his own discovery of an offence actually being committed there is no reason to refer to a belief based upon reasonable and probable grounds.

[17] Subsequent appellate case law has added to and clarified the statements made in *Biron*. For example, in *Regina v Stevens* (1976), 33 CCC (2d) 429 (NSSC (AD)), MacDonald JA, for the Court, considered *Biron* and stated (at p 434):

> The requirement of reasonable and probable grounds relates only to arrest without warrant in indictable offences (s. 450(1)(*a*)) [now s. 495(1)(a)] not to summary conviction offences such as creating a disturbance. In order to arrest a person without a warrant for a summary conviction offence it is not sufficient for the arresting officer to show that he had reasonable and probable grounds to believe such offence had been, or was about to be, committed; rather, he must go further and show that he found a situation in which a person was apparently committing an offence.

[18] The young person argues that, due to the difference between the two sections, an officer must have a specific offence in his mind in order to determine whether it is an indictable offence or summary conviction offence and, therefore, whether he or she can arrest without warrant in a situation where the officer does not see the accused actually committing an offence (such as here). In this case, Cst. Lecocq only indicated that the young person was being arrested for a "weapons-related offence" and did not specify a particular weapons offence. As "weapon-related offences" include both

hybrid and summary conviction offences, an officer's power to effect an arrest differs depending on the specific offence.

[19] I agree that a police officer may arrest someone upon reasonable grounds only if the offence is an indictable offence. He or she cannot arrest on reasonable grounds for a summary conviction offence. However, it should be remembered that hybrid offences found in the *Code* are deemed to be indictable offences by virtue of section 34(1) of the *Interpretation Act*, RSC 1985, c I-21. That provision reads:

> **Indictable and summary conviction offences**
> **34(1)** where an enactment creates an offence,
>
> > **(a)** the offence is deemed to be an indictable offence if the enactment provides that the offender may be prosecuted for the offence by indictment.

[20] Case law interpreting this provision has concluded that, where an offence "may" be prosecuted by indictment or summary conviction, the *Interpretation Act* provision will apply and the offence must be deemed to be an indictable offence until the Crown otherwise elects. See, for example, *R v Dudley*, 2009 SCC 58 at para 18. Thus, where an offence is a hybrid offence under the *Code*, the offence will be deemed, at the time of arrest, to be an indictable offence and the police officer may arrest on reasonable grounds. See also *R v Huff*, 1979 ABCA 234; and *Tétard c R*, 2010 QCCA 2235.

[21] As well, the police officer does not need to identify or have a specific offence in mind at the time they arrest a suspect (as long as the

possible offences that are being contemplated by the officers are hybrid or indictable offences).

[22] To begin, it should be recognised that there is a statutory duty under the *Code* to give notice to a person of the reason for arrest upon arresting him or her. The section refers to the reason, not the exact charge. Section 29(2)(b) of the *Code* states:

> **Notice**
> **29(2)** It is the duty of every one who arrests a person, whether with or without a warrant, to give notice to that person, where it is feasible to do so, of
>
> (b) the reason for the arrest.

[23] The jurisprudence seems to indicate that it is sufficient to give the accused the substance of the reason for the arrest. In *Regina v Fielding*, [1967] 3 CCC 258 (BC CA), the Court states (at p 261):

> I am not aware that the law requires the exact charge, chapter and verse, to be given to comply with the section. The appellant was being, and was liable to be, arrested for driving a motor vehicle on a highway in the Province when his licence to drive had been suspended by proper authority. So to do could be an offence under both the *Criminal Code* and the provincial *Motor-vehicle Act*, and it was for the prosecution to decide, not necessarily the arresting officer, what charge or charges, under which statute or statutes, should be laid.

[24] Another provision to be considered is section 10(*a*) of the *Charter*, which states:

> **10.** Everyone has the right on arrest or detention
> (*a*) to be informed promptly of the reasons therefor.

[25] Section 10(*a*) was considered by the Supreme Court of Canada in *R v Smith*, [1991] 1 SCR 714. In *Smith*, McLachlin J (as she then was), in the context of discussing whether a failure to provide an accused with the full reasons for his detention or arrest would affect any waiver of his right to counsel, stated (at pp 728-29):

> Nor is the failure of the police to precisely identify the charge faced in the words of the *Criminal Code* necessarily fatal. In the initial stages of an investigation the police themselves may not know the precise offence with which the accused will be charged. Moreover, the words of the *Code* may be less helpful to a lay person than more common parlance in communicating the extent of jeopardy.
>
> The accused need not be aware of the precise charge faced. Nor need the accused be made aware of all the factual details of the case. What is required is that he or she be possessed of sufficient information to allow making an informed and appropriate decision as to whether to speak to a lawyer or not. The emphasis should be on the reality of the total situation as it impacts on the understanding of the accused, rather than on technical detail of what the accused may or may not have been told.

[26] Also see *R v Goodkey*, 2015 BCCA 64, leave to appeal to SCC refused, 36323 (13 August 2015), in which the Court of Appeal held that the police did not violate section 10(*a*) of the *Charter* when they told the accused that he was being arrested for "smuggling", but did not tell him <u>what</u> he was accused of smuggling (at para 28).

[27] It is also worth comparing section 11(*a*) of the *Charter* with section 10(*a*) of the *Charter*. Where section 10(*a*) indicates that everyone has the right "<u>on arrest</u>" to be informed of "<u>the reasons</u> therefor", section 11(*a*) indicates that "[a]ny person <u>charged with an offence</u> has the right to be

informed without unreasonable delay of the specific offence". This suggests, at least for *Charter* purposes, that a police officer is only required to turn his or her mind to a specific offence when the officer is at the charging stage.

[28] Thus, I agree with the SCA judge that police officers are not required to articulate a specific offence at the time they arrest a suspect. Rather, the authorities suggest that as long as the police officers articulate the substance of the offence that they have in mind to the suspect and those offences are hybrid or indictable offences, then the officers' arrest of the accused, without a warrant but on reasonable grounds, will be valid.

[29] In this case, the young person has argued that Cst. Lecocq had to articulate the specific weapon offence he was contemplating because weapon-related offences include the summary conviction offence of carrying a weapon while attending a public meeting (see section 89(1) of the *Code*), for which an arrest without warrant on reasonable grounds would be illegal. However, a perusal of the weapon-related offences in the *Code* (contained in sections 85-108) reveals that carrying a weapon while attending a public meeting is the only weapon-related offence that is purely a summary conviction offence. Every other weapon-related offence is either an indictable offence or a hybrid offence (thus deemed indictable until the Crown elects otherwise).

[30] There was, in this case, absolutely no evidence upon which it could be established or inferred that the young person was attending, or about to attend, a public meeting. Constable Lecocq testified that he told the young person that the police had received a call about him playing on the stage with a large knife, and he was therefore being arrested for weapons-related offences. Constable Lecocq made no mention of any concern or report

regarding the young person attending any meeting with the knife, nor was he asked whether he had any such concerns or reports.

[31] Were there reasonable grounds? In *R v Storrey*, [1990] 1 SCR 241 at 249-51, the Supreme Court of Canada held that the requirement for reasonable grounds includes both subjective and objective grounds for an arrest and the Crown has to prove on a balance of probabilities that the arresting officer subjectively believed that there were reasonable grounds to conclude that the person either had committed or was committing a criminal offence at the time, and that the officer's grounds for belief were objectively reasonable (see *R v S (WEQ)*, 2018 MBQB 51 at paras 10-12).

[32] Constable Lecocq, the arresting officer, testified that he believed that he and his partner had reasonable grounds to arrest the young person, as the young person clearly matched the description of the perpetrator provided by the witness, and because he believed that the 12-inch knife described by the witness had no purpose on the streets of Winnipeg except as a weapon. He also indicated that there was a mention of firearms in the black backpack on a previous date, which was also a concern.

[33] Constable Lecocq's testimony establishes that he subjectively believed that the young person in front of him was the person who the witness had seen playing with a 12-inch knife approximately 10 minutes earlier, and that he subjectively believed the knife to be a weapon, it having no other purpose on the streets of Winnipeg.

[34] There were also several pieces of evidence, taken together, which would lead a reasonable person, placed in the position of Cst. Lecocq, to conclude that there were reasonable grounds to arrest the young person for

weapons-related offences. The witness who called 911 identified himself (i.e., this was not an anonymous tip), and gave specific, detailed information about a young male who was playing with a 12-inch knife. Based upon the fact that the witness made a 911 call to the police, it was clear that he had genuine concerns about this young male possessing or handling this large knife, despite describing him as "playing" with it. Within 10 minutes, almost all of the information provided by the witness was confirmed when the officers arrived—a young male, exactly matching the description given, was standing on the stage where the witness said he would be, near a bicycle and a black backpack, as reported. The only inconsistency was the absence of the 12-inch knife in the young male's hand. However, Cst. Lecocq was aware that the witness had reported seeing the same young male, two days earlier in the same location, take air pellet handguns out of the same black backpack that was currently lying one to two feet away from the young male.

[35] Given that almost everything the witness reported in his 911 call was observed by Cst. Lecocq to be accurate, there would be no reason for Cst. Lecocq or anyone else in his position to disbelieve the report that a young male had been playing with a 12-inch knife approximately 10 minutes earlier, or the witness's report that he had seen the same young male take other weapons (air pellet handguns) out of his black backpack a couple of days earlier. Based on all of this information, it is my view that it was objectively reasonable for Cst. Lecocq to believe that the young male had been playing with a 12-inch knife, as reported, and to believe that the knife was probably inside the black backpack that was lying close to his feet. In all of the circumstances, Cst. Lecocq had no reason to doubt what the witness reported. Consequently, Cst. Lecocq's subjective belief was also objectively justified.

[36] Reasonable grounds are based on the totality of the circumstances taking into account all available reliable information. Both the trial judge and the SCA judge held that, taking into account the specific and detailed information given by the witness which was confirmed by Cst. Lecocq's observations when he arrived on the scene, there were both subjective and objective grounds to believe an indictable offence had been committed.

Are These Knives Weapons?

[37] Section 2 of the *Code* currently defines the word "weapon" as follows:

> [***W***]***eapon*** means any thing used, designed to be used or intended for use
>
> **(a)** in causing death or injury to any person, or
>
> **(b)** for the purpose of threatening or intimidating any person
>
> and, without restricting the generality of the foregoing, includes a firearm [remaining definition excluded as inapplicable].

[38] There are thus three ways in which a knife may be determined to be a weapon: (1) the knife is actually used as a weapon—i.e., to cause death or injury to a person or for the purpose of threatening or intimidating any person; (2) the knife is designed to be used as a weapon—i.e., to cause death or injury to a person or for the purpose of threatening or intimidating any person; or (3) the knife is intended to be used as a weapon—i.e., to cause death or injury to a person or for the purpose of threatening or intimidating any person.

[39] There is no allegation in this case that the young person actually used the knife as a weapon. As well, a knife is normally designed to be used

for utilitarian, peaceful purposes and not as a weapon, notwithstanding the fact that it can, on occasion, be used effectively in fighting and notwithstanding that some types of knives have been recognised as having been "designed to be used" as a weapon (see *Regina v Arrance* (1971), 3 CCC (2d) 341 at 345 (BC CA); see also *Regina v Crawford* (1980), 54 CCC (2d) 412 (Ont CA); and *R v Constantine*, 1996 CarswellNfld 24 (CA)).

[40] However, where there is no evidence that the young person actually used a knife as a weapon and no evidence that a knife was "designed to be used" as a weapon, then, as indicated in section 2 of the *Code*, a court must consider whether the knife was "intended for use": (a) in causing death or injury to any person; or (b) for the purpose of threatening or intimidating any person.

[41] The courts will consider all of the circumstances surrounding an accused's possession of a knife when attempting to determine whether or not he or she intended to use the knife as a weapon. Courts have relied upon many different circumstances to support the inference that the accused intended to use the knife as a weapon, including:

- the type of knife and its usual or designed purpose;
- what the accused was doing and where he or she was at the time he or she was seen or arrested;
- where the knife was located;
- whether the accused had other weapons with him or her; and
- any explanations the accused offered for the knife's possession.

See *Regina v Blondell* (1972), 8 CCC (2d) 130 (BC CA); and *R v Roberts* (1990), 60 CCC (3d) 509 (NS CA);

[42] A trial judge must consider the circumstances surrounding the possession of the items and, if there is evidence upon which the trial judge could have inferred that the accused intended to use the knives as weapons, then an appeal court should not interfere (see *R v Vigneau*, 1978 CarswellNS 176 at para 22 (Co Ct); *R v Mantee*, 1982 CarswellSask 1022 at para 13 (QB); *R v Starr*, 1983 CarswellSask 538 at para 7 (QB); *R v Martin*, 1986 CarswellBC 1839 at para 6 (Co Ct); *R v SK*, [1995] BCJ No 2529 at para 17 (CA); *R v M (DM)*, 1999 CarswellBC 1820 at para 30 (SC); and *R v Vader*, 2018 ABQB 1 at para 9, leave to appeal to Alta CA refused 2018 ABCA 71 (in chambers)).

[43] In this case, the trial judge considered the circumstances surrounding the young person's possession of the knives, as the law requires. She considered the number of knives and other items that could be weapons that were found concealed, the time of night, and the young person's presence in a public place with these items. Furthermore, the following evidence supports the trial judge's inference that the young person intended to use the knives as weapons:

- The young person was seen with a 12-inch "bowie" knife and was using it to cut up bales of hay on a bandstand stage, at night, in a public park in Winnipeg, where other people were present;

- The young person did not put the knife away when asked to do so by a friend;

- Constable Lecocq testified that a 12-inch “bowie” knife was not a hunting weapon, that the only use he could think of for it would be as a decoration on a wall, and that the only reason for someone to have this type of knife on the streets of Winnipeg would be to use it as a weapon;

- There were multiple knives in the young person’s backpack, along with a prohibited weapon (brass knuckles), a collapsible baton, and two air pellet handguns with cartridges;

- The young person also had a small folding knife concealed in his pocket; and

- The young person offered no explanation at the trial for the possession and concealment of these items.

[44] The SCA judge noted that the trial judge examined all the circumstances to determine the young person’s intention and found no error in law in the trial judge’s conclusion that the items seized were weapons. In my view, the SCA judge made no error of law regarding the applicable law in coming to that conclusion.

CONCLUSION

[45] Officers are not required to articulate a specific offence when arresting someone on reasonable grounds, as long as the substance of the offence is communicated to the accused and the offence contemplated by the officer falls into the category of a hybrid or indictable offence.

[46] The trial judge made reasonable findings of fact that, in the circumstances, and at the place and time that the young person was in possession of the knife, it constituted a weapon and that, given the level of credible information available to police, his possession of it in a concealed manner constituted the elements of at least one but possibly more, criminal offences, justifying his arrest for "weapons-related offences".

[47] In deferring to the decision of the trial judge, both with respect to whether there had been a *Charter* breach and, if there was, whether the evidence should, nonetheless, be admitted into evidence, the SCA judge committed no error. There is no arguable case of substance. I dismiss the motion for leave to appeal.

Steel JA