

THE ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

v.

C.H.

R E A S O N S F O R J U D G M E N T

BEFORE THE HONOURABLE MADAM JUSTICE C. BREWER
on September 21st, 2009, at Toronto, Ontario

APPEARANCES:

Ms. K. McDonald

- Counsel for the Crown

Mr. J. Scarfe

- Counsel for defendant

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Brewer, J. - Reasons for Judgment R E A S O N S

F O R J U D G M E N T

Brewer, J. (O.C.J.): (orally)

In this case C.H. is charged with three criminal offences, all of which allegedly occurred on February 3rd of 2008. First, it is alleged that he wilfully obstructed Jerry W. Habuda, an officer, a police officer engaged in the execution of his duty, by interfering with an arrest. Second, it's alleged that Mr. H. assaulted Officer Habuda, who was engaged in the execution of his duty. Thirdly, it is alleged that Mr. H. assaulted Officer Habuda with the intent to resist his lawful arrest.

The circumstances with respect to these charges relate to the aftermath of a vehicle stop. After Constables Habuda, Lee, and Garganis pulled Mr. H.'s cousin Wilson Edwards' vehicle over, the Crown alleges that Mr. H. pulled up in his motor vehicle; that he acted very aggressively with the police officers; that he pushed Constable Habuda aside in trying to get into the driver's door of his cousin's vehicle; that Mr. H. ran around the car and then opened the passenger door of the car in order to get some material from the vehicle; that when he was arrested by Constable Habuda, who seized his elbow, Mr. H. pushed the officer and ran up onto the porch of his aunt's home. It is alleged that when the officers tried

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to take control of him, when he was by the front door of the residence, that he - that Mr. H. punched Constable Habuda and then struggled to get away from Officers Habuda and Garganis until they managed to control him.

On the defence account of these events, Mr. H. drove by his cousin's residence, saw a police car there and, after dropping off his girlfriend, came back to find out what was going on. He got out of his vehicle and essentially asked the police what was going on. His cousin asked him to get the card for his lawyer that was in the vehicle. He took a step towards the car, but stopped when told to do so by the officers. He went up to the porch and knocked on the door in order to get his aunt's attention. Unfortunately there was no response. He returned to the area where his cousin was being held by the officers and protested the way in which he was treated. Specifically, he described seeing his cousin's head pushed down onto the motor vehicle and after that was punched in the back of the head as he retreated towards his aunt's home.

In this case Mr. H. is presumed to be innocent unless and until the Crown has proven each essential element of these three offences beyond a reasonable doubt. Reasonable doubt is based on reason and common sense. It is logically connected to the evidence or the lack of evidence.

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It is not enough for me to believe that C.H. is possibly or even probably guilty. Reasonable doubt requires more. As a standard, reasonable doubt lies far closer to absolute certainty than it does to a balance of probabilities. At the same time, reasonable doubt does not require proof beyond all doubt, nor is it proof to an absolute certainty.

In assessing the credibility of the witnesses in this case, I remind myself of the principles the Supreme Court of Canada set out in the case of *R. v. D.W.* First, if I believe the defence evidence, I must acquit. Secondly, if I do not believe the defence evidence but I am left in reasonable doubt by it, I must acquit. Lastly, even if I am not left in doubt by the defence evidence, I must ask myself whether on the basis of the evidence I do accept, I am convinced beyond a reasonable doubt by that evidence of Mr. H.'s guilt.

Not surprisingly in this case the accounts of the various witnesses, both for the Crown and the defence, did not entirely agree with one another. I think it is fair to say that this was a very tense situation. Some of the discrepancies in the accounts of the events may be attributable to human frailty or different experiences and the passage of time. However, other inconsistencies cast doubt on the accuracy and the reliability of

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certain witnesses' version of the events.

In this case, I begin by looking at the defence evidence. With respect to Patricia Blake, Ms. Blake did not really have any view of this situation until after the really crucial interactions between Mr. Edwards, Mr. H., and the police were already relatively settled, shall we say. At that point in time Mr. H. was bent over the railing of the front patio of the front porch of the Edwards or Ms. Blake's home and he was certainly under the control of the police at that point in time.

Accordingly, her evidence does not specifically address the key portions of the events that are in issue here. However, I do note that there were discrepancies between Ms. Blake's account of the events in examination in chief with respect to the instructions that she was given by the police and the version of events that she agreed to in cross-examination where she admitted being told five times to stay away from the vehicle before actually reaching into the car and taking out the lawyer's card.

With respect to Mr. Orlando Shaw, he initially placed these events at night as opposed to the middle of the day. He was not forthcoming with respect to his criminal record until it was placed before him in cross-examination. He testified

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that Mr. H. was punched by the police more than once, although Mr. Edwards, Mr. H., and indeed Constable Habuda himself describe a single blow.

With respect to Mr. Edwards and Mr. H. himself, I recognize that both had the opportunity to see the cell phone videotape that has been shown to all the witnesses in this case prior to their testimony. I recognize that Mr. H. testified after hearing Mr. Edwards' testimony. Nonetheless, it seems to me that there is a fair amount of consistency in their account of these events and that is of some significance, in my view, in assessing the reliability of their evidence.

By contrast, in my view there are significant discrepancies in the police version of these events. Constable Habuda's evidence was internally consistent as to when CPIC was contacted with respect to Mr. Edwards. Although Constables Garganis and Habuda both had notes of these events, their evidence was at odds with respect to who was driving the unmarked police car; when they observed and where they observed Mr. Edwards' car; what brought their attention to Mr. Edwards' vehicle; who assisted Constable Lee in cuffing Mr. Edwards; where Mr. H. stopped his car; if the gears were grinding or not; where Mr. Edwards was being held on his vehicle; whether Mr. H. in approaching the police was moving

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forward and backing off and moving forward and backing off repeatedly as described by Habuda but was not noticed by Garganis whatsoever; and significantly whether Constable Habuda actually punched Mr. H..

The officers both described the initial portion of Mr. H.'s interaction with them as involving him getting out of the vehicle and yelling, "That is an illegal search." That is a rather odd initial account of these events, given that it appears at the time that Mr. H. arrived there was no search ongoing. Certainly a person who is simply pulling up in a motor vehicle to find out what was going on would be highly unlikely to utter those words. That seems unusual and unlikely.

In addition, the accounts of both Officers Habuda and Garganis prior to seeing the video describe a single instance in which Mr. H. came up to them very aggressively as if to attack them, that he tried to get in the driver's door of Mr. Edwards' vehicle and went toward it, opened the passenger door.

Yet, they described a single instance of going off onto the patio as opposed to two; whereas the video shows Mr. H. arriving, having an initial brief interaction with the police, then going up to the house. There is certainly no indication that Mr. H. at that time was acting like a

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crazy man, as described by Constable Habuda. These significant discrepancies in the account of the events, although I appreciate they arise at the initial stages of their testimony, cause me to have very serious concern about the entirety of their evidence and its reliability. As a consequence, I am not satisfied that the Crown has proven this charge beyond a reasonable doubt - any of these charges beyond a reasonable doubt. The charges are dismissed.

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notes and recordings to the
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Yigal Kogan, Court Reporter ed November 24,
2009, at the City of Toronto

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