

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

ORAL REASONS FOR JUDGMENT OF HIS LORDSHIP THE HONOURABLE WILLIAM G. MORROW, sitting as a Magistrate, given on the 12th day of December, A.D. 1966, at Inuvik, N.W.T.

In the matter between:

HER MAJESTY THE QUEEN

Complainant

- and -

MAURICE HUGH McDOUGALL

Defendant

(Section 110(a) of the Criminal Code)

Appearances:

Orval J.T. Troy, Esq., appeared on behalf of the Crown.

Mark M. deWeerdt, Esq., appeared on behalf of the Defence.

MR. JUSTICE W MORROW
TERRITORIAL COURT OF THE
NORTHWEST TERRITORIES
YELLOWKNIFE, -- N.W.T.

MORROW, J.

In this case I am sitting as a Police Magistrate in place of Magistrate Parker, who normally would have had the case, because it was brought to my attention that one of the witnesses was about to be transferred to a very remote outpost, which, I believe, was Alert Bay. That is what I took the case.

Section 110, of the Criminal Code, under which the charge is laid, ^{reads} states:

Every one who

- (a) resists or wilfully obstructs a public officer or peace officer in the execution of his duty or any person lawfully acting in aid of such an officer, . . .
- is guilty of an indictable offence and is liable to imprisonment for two years.

~~Now~~ there is a case R. v. Taillefer, [1954] RLR 562, "The essential elements of an offence under Section 110(a) are:

- (a) that the peace officer should ^{have} been in the execution of his duty, ~~at the time of his obstruction;~~
- (b) that there should ^{have} been actual resistance of obstruction; and
- (c) that the resistance or obstruction should be wilful."

Other cases indicate that "wilful" means a "conscious or deliberate effort", among other things.

Now, what I propose to do is to discuss some of the principles of law that may apply, and then review the facts.

In an article ^{Lecture} by John Honsberger ^{published} put out by the Law Society of Upper Canada, 1963, there was a ^{entitled} lecture on Arrest and Interrogation. Page 37 states "A police officer is only authorized to use force to effect a legitimate purpose. If he goes beyond this he commits assault. In no circumstances can a police officer justify the use of excessive force. He may use only the force necessary in preventing escape by flight."

Now I am satisfied, and I will spend no more time on this, that one essential element of Section 110(a), namely, that the peace officer should be in the execution of his duty at the time, has been satisfied.

Now I might have made some comment on the fact that on the particular and peculiar circumstances of this case there may have been an excessive show of enthusiasm on the part of the police constables, but I am satisfied that element has been proven beyond a reasonable doubt.

Now there are ^{two} some other cases, ^{R v} the Forbes case, 10 Cox C.C. 362 and ^{R v} Marsden, 11 Cox C.C. 90, that discuss what is the test of obstruction. Those cases indicate that it may be an offence of obstruction if a person ^{by} the incitement of a mob to rescue — by following the officer and the prisoner in a menacing attitude, although without actual physical contact; and ^{the} evidence of the officer that ~~he was~~ ^{he was} at the time of the offence engaged in taking to the police station a man ^{with police station} that he had arrested, raises a presumption that the arrest was ^{made} legally made, and where such presumption is not rebutted, a conviction could not be set aside for want of evidence that the officer was justified in making the arrest, and ^{he} was, therefore, acting in the execution of his duty.

Now ^{R v} another case, ^{4 MPR 142} the D'Entrement case, in 57 C.C.C., ^{4 [1932] 2 D.L.R. 236 (NSC)} Page 177, indicates that the refusal of a person to move away when ordered by an officer to do so has been held to be an obstruction depending on the circumstances, and again in ^{R v} the Sutherland case, [1944] 1 W.W.R. 529, ^{59 B.C.R. 159 (B.C.C.A.)} it goes on to say again in order for this type of obstruction to be unlawful the officer must be acting lawfully and in the execution of his duty.

Now we have already established that part. Honsberger, on Page 29, states, ^(subject 5 and single space) "Anything is obstructing an officer in the execution of his duty the natural effect of which would or might be to prevent him from obtaining evidence concerning an offence, real or supposed, against the law, which it is his duty to investigate, or concerning which it is his duty to see or obtain evidence. The obstruction need not be physical, nor need it be effective."

That is the end of that quotation.

In Hinchcliffe v. Sheldon, ^{[1955] 1 W.L.R. 1517 ER} 1955, 3 All England Reports Page 406, it ~~states again~~ ^{was held} that making it more difficult for the police to carry out their duties may constitute an obstruction, and ^{that} their duties are the type just outlined from Honsberger.

Again, in a district court case of Alberta, the Ketchmer case (1961) 36 W.W.R. 467, it is stated that it was not an obstruction for an accused to answer to the questions of the policeman who was searching for liquor, and not to do as he asked.

Again in O'Connor, "Analysis and Guide to the Criminal Code", ^(subject 5 and single space) at Page 71, we find it is stated: "Rash words, violent or obscene language to the peace officer do not of themselves form a sufficient ground for an arrest and prosecution unless calculated to deter the officer from doing his duty, or directly tending to a breach of the peace."

A general reading of these cases I think will indicate that there is a reluctance to uphold any member of the police when dealing with liquor cases, but I am not treating this one as if it ^{was} under the Liquor Ordinance, for the purpose of obstruction under Section 110.

Now this case on its facts typifies what the court and ^{the} law enforcement officers, such as the police and the Crown Prosecution

* those considered by

and Defence Counsel, all of whom have done their job well here when we have a collection of witnesses. The more witnesses we call the more stories we get. I don't mean by that that anyone has told a falsehood. No one gets a perfect picture and retains a perfect picture in his memory, and all I can do as a judge, is ^{conduct} ~~take a~~ guess unless I do not accept the evidence of anyone, and try to get the best picture I can under the circumstances.

Now Mr. McPherson who initiated the call that brought the police to the scene, observed, among other things, a person running away after escaping from the police car. He observed that person being tackled. He states a scuffle took place, and ^{that} the person was grabbed, or brought back by the back of the neck, and the phrase he used was ^{that} "he was hauled back". I don't think too much matters about the other attempts by this person to get out of the car, and I do not pay too much attention or place too much emphasis on whether he was struck by the constable who put him back in the window, or whether he was pushed back. I think by this time the police constables were having considerable difficulty and were frustrated in their efforts. That does not mean I am justifying what they did. Maybe they were a little too tough, but then they were having difficulty in the darkness.

What I am more concerned about is the evidence involving the accused himself. Mr. McPherson observes that this person, the accused, although McPherson can't identify him, went in front of the bumper of the police car and the police blew their horn a few times, but the man wouldn't get out of the way, and the policeman got out and put a man in custody. That is McPherson's observation.

~~Now~~ Constable Jennex, after describing how the arrest had been made, and describing the man escaping, indicated that he warned the

accused to keep away. The accused went around on the other side and told Gordon to observe everything the police did to him, to watch out for police brutality. I am satisfied that these words by the accused were directed to the man Gordon after he had been dragged back, after he had been tackled and dragged back. The accused continued to direct remarks on the police brutality, telling Gordon to keep track of what happened to him, and he tried on at least one occasion to open the car door to talk to him.

The constable told him to quit. This constable's evidence is, "that the accused was sober, never raised his voice, and his manner was easy going". ~~Now I am going to observe that in my experience, if a person is charged with intoxication he never shows the signs of intoxication in a police investigation.~~ I am not chastizing anyone, but I am making an observation based on some ^{twenty-five} 25 years' experience.

Now Constable Ford agrees with the first Constable's evidence, although there are some differences, but I don't see anything vital about this. Everyone is doing his best to tell the truth, ~~but we~~ have the accused in the eyes of this constable making several remarks, and one ^{is} giving out the time of 2:06 and indicating that ^{he is} ~~he is~~ being dragged with his shirt up over his back. The constables, as I recall my notes, agreed that that was essentially the correct time and the correct record of the event. This constable has the accused standing in front of the police car with his back towards the car. It seems to be a common knowledge, and agreed to by both constables and by most of the witnesses, ^{if} not all, that the police car could have been negotiated out of the area near PMQ 10 without the necessity of honking the horn, without the necessity of pushing the accused out of the way, and without the necessity of taking the accused into custody.

Albert Goller, among other things, describes how the two were trying to get Mr. Gordon down the stairs, and how the police took charge, and how there was a chase, and how the man was dragged back to the car, and this man remembered the police shouting, "Don't touch the car". Now, such things as "Don't touch the car" are part of the ^{evidence} elements I have to take into consideration to decide whether that indicates it was ^{the accused's} his intention to obstruct, or whether, as has been suggested by some of the witnesses, it merely indicates an attempt to protect a person ^{who} ~~that~~ could have been apprehended without the use of too much force, or an attempt to tell him what his constitutional rights were. The three were then in ~~the~~ front of the car, and there appeared to be another conversation. The car ^{drove} drives forward, the horn blew, and then the car came up to the person, ^{and} one of them came around and yelled; and then ^{the accused} he was arrested.

Mr. Adams had his own version. He has the police dragging Gordon back. On the question of the car when it was about to leave, he has one person directly in front of the car. Again, he has the police on the horn, he has the car eased forward and ^{the person in front of the car} ~~he was~~ gently nudged and got out of the way; and one of the constables jumped out and took ~~a~~ hold of him, and the word used was "wished" him into the car. This witness describes the bringing back of Mr. Gordon as ^{him being} ~~he was~~ hauled across the ground by the collar with his back to the ground, his shirt pulled up. ~~Now~~ Colin Gordon's evidence is of ~~a~~ very little help.

The accused's evidence is of very little help. Mr. Martin advised you they were trying to walk Gordon home, and that they were having some trouble; and that this ^{he} man had been brought to the apartment while ^a the taxi was to be phoned, to get ^{him} the man home; that the police came, went up the steps and took over, and he says he heard ^{one of} them say, ^{to Gordon,} ~~one of~~ them, "Let's go! Come on, let's go!" ~~to Gordon,~~ and at this point the

accused came out, presumably from having phoned for a taxi. There is no doubt that the accused knew the persons ^{with whom he was} ~~that he was concerned with~~ here were police officers. There can be no doubt upon that fact.

I make no comment with respect to the hurt on the accused's nose. Presumably, that took place some how or other while he was either being put into the police car, or while he was being taken back to the detachment. In any event, he has made no complaint against the police ^{of} ~~for~~ brutality insofar as he himself is concerned.

Now I am glad that Corporal Pringle has been very fair about the question of the relationship as between the two services, ^{without here} It is not unnatural if one finds from time to time a feeling from some of the seamen. The police have to carry out their duties under trying difficulties, and the officers of each of the services so far as possible have carried ^{on} ~~out~~ a good and practical relationship.

Mr. Halle, ^{also} ~~again~~ he described the attempt to help Gordon home and keep him out of trouble, and how the accused was attempting to help by calling a cab. The general picture that one gets from all of the evidence is, ^{that} we have the accused attempting to do a good deed. We have police called to quell a disturbance, or what might be a disturbance. So, in the mind of the accused we have good intentions, and those good intentions carry forward, ^{and} I cannot help but reach this conclusion on the evidence before the Court, ^{his} to the extent of, ^{then} attempting to advise Gordon and protect him from what he thought was brutality, having watched the manner in which he was caught and hauled back. On the side of the police, they had come there thinking they were, to quell a disturbance. In their minds they perhaps were heated up with the idea that there was something wrong when they drove up. They did not find a disturbance, but they did find a man obviously intoxicated. He was sufficiently intoxicated that he made these

foolish attempts to escape, and took an amount of persuasion that would normally not be necessary. I think probably the police got too enthusiastic, or were careless; but as I say, who can blame them under the particular circumstances. ²¹⁸ They were however, able to take the man into custody. They were able to complete the investigation and get in the car and prepared to leave without being interfered with by the accused. At this point the police car hits the accused here in the front. ^{It is infer} I can see here that the driver of the police car had reached the boiling point. Undoubtedly, he had taken some abuse in language, no question about it, but that is part of police work. ^{as taught} they pick up that in their training, and the Corporal gave some indication of what the training is. They have to take some of that, ^{it} it is unfortunate because they are our protection, but I can ^{understand} just see the driver of that car being goaded into pushing the accused with his bumper. I think that was the last frustration, but I don't think that the position of that man being there indicated ^{do not} ^{fact} ^{the accused} in spite of the frustration, on the evidence that it was necessary to push him.

Without in any way attacking the efforts of the police, I do not find there ^{has the} has been a charge under Section 110, ^{(a) to be} proven beyond a reasonable doubt, ^{with respect to} on the two remaining elements, ^{if} namely the actual obstruction and ~~namely the wilfulness.~~
