

ONTARIO COURT OF JUSTICE

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B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

BABAK ANDALIB-GOORTANI

Before Justice L. A. Botham
Heard on June 3, 5, 6, 7, 10, 11, 12 and 14, 2013
Reasons for Judgment released on September 12, 2013

Mr. P. Perlmutter and Ms. M. Flanagan counsel for the Crown
Mr. H. Black and Ms. J. Mulcahy counsel for the defendant Babak Andalib-Goortani

BOTHAM J.:

[1] Police Constable Babak Andalib-Goortani is charged with assault with a weapon arising from his participation in the arrest of Adam Nobody on June 26 2010, the Saturday of what has come to be known as the G-20 weekend.

[2] It is the events of that arrest which form the subject matter of this trial. The issue for the Court to determine is whether the force used by Constable Babak Andalib-Goortani against Mr. Nobody was unlawful.

[3] Factually this is quite a simple case. The arrest of Adam Nobody took very little time. It was recorded by at least four different people. Those recordings clearly show the defendant striking Adam Nobody with his police asp. The defendant testified that he believed it was necessary to engage in the arrest and use his asp.

[4] An agreed statement of fact was filed as evidence at this trial. It is

conceded by the Crown that there were reasonable and probable grounds to arrest Adam Nobody. I was not told what those grounds were. I can only speculate that he was arrested, as Cst. Hockaday testified, because he was taunting the officers and did not leave when directed to do so. It is conceded that Cst. Babak Andalib-Goortani was assigned to mobile team 5 along with Sgt. Lynn Hughes, Cst. Michael Adams, Cst. Dave Donaldson, Cst. Adam Phillips, Cst. Lindsay Neale, Cst. Juan Valencia and Cst. Oliver Simpson.¹ It is clear from the evidence that some of these officers were involved in the arrest of Adam Nobody.

[5] Few time lines were given for the evidence called at this trial by Crown or defence. It was asserted by the defence and not challenged by Crown counsel that the arrest of Adam Nobody occurred at 8 p.m. In the CTV footage filed by the defence, Mr. Nobody can be seen with his hands in his pockets facing a line of riot police. That was filmed at 6 p.m. The defence called 5 officers who have testified as to observations they made of him prior to his arrest. Although they were unable to provide times for those observations, it is clear that the majority of the officers were relieved around 7 p.m. and when they returned to the line they observed Adam Nobody under arrest. I can only conclude that there was a break between their observations of him and his arrest of possibly an hour.

[6] The video recordings of Adam Nobody's arrest form part of the evidence at this trial as do the many stills printed from those videos. Exhibit 7 is a video filmed by Elliot Coombe; Exhibit 8 is a video filmed by Robin Koke; and Exhibit 45 is a video entitled 'Nobody Arrest'.

[7] Exhibit 3 is a video filmed by John Bridge, a web designer who came to Queen's Park to observe the G-20 protests. He recalls that he arrived around suppertime. There was a line of police officers in riot gear facing off against a crowd of people. At some point the line of officers began to rap on their shields and slowly advance towards the crowd, moving them north towards the Legislative Building. Although at some point he saw a brick being thrown from the crowd, he maintained that over all the interaction which he observed between the protesters and the police was more non-altercation, than altercation.

[8] CTV footage filmed at 6 p.m. that day at College Street and University Avenue is consistent with Mr. Bridge's description. The footage shows a line of officers in riot gear and a large number of people milling around the area. People at the front of the line can be seen shouting at officers. There is no physical contact between the police and anyone in the crowd. It can be seen that an object is thrown from the crowd towards the police. It landed on the ground. At some point the police begin to strike their shields and advance towards the crowd.²

[9] Once at the Legislative Building, the police line was stationary. When John

¹ Exhibit 1

² Exhibit 27

Bridge saw officers chase a man and take him to the ground, he started to record what was happening. He posted this video on U-Tube and within a few days of the posting was contacted by Mr. Nobody who said that he was the man being arrested. Mr. Bridge provided the clips to Mr. Nobody and was later interviewed by the Special Investigations Unit. (S.I.U.)

[10] Adam Nobody works as a stage manager. He has no criminal record. That day he had decided to ride his bicycle downtown and see what was happening with the G20 protests. He had a back pack and a water bottle containing rye and water.

[11] When he arrived at College Street there was a line of police officers blocking the crowds from moving north. He remained there for about 20 minutes and then cut through the University of Toronto campus and arrived at Queen's Park where he observed another line of officers wearing face masks and carrying shields.

[12] He joined the crowd that was facing off against the police line. He challenged the officers as to why they were pushing people back. He recalled that officers approached him and others telling them to move. He denied seeing anything being thrown at the officers.

[13] At some point officers approached him from behind and his water bottle was knocked from his hand. There was a line of officers standing over the water bottle. The officers told him to leave but he refused to do so without his bottle.

[14] Ultimately Mr. Nobody did leave without the water bottle and met up with a friend named Steve Spencer. He estimated that he spent about 20 minutes with him. Exhibit 30 is a time stamped photo from 7:10 p.m. showing Mr. Nobody speaking to someone he has identified as his friend, Steve. He then left the area and returned sometime later with beer and a piece of Bristol board.

[15] He sat down near the Legislative Building and started making a sign. Within approximately 10 minutes, he saw officers walking towards him. He picked up his backpack and started to walk away. He looked behind and saw an officer running towards him, so he also ran. He heard someone say 'get him' and he was grabbed from behind and taken to the ground, landing face down. He agreed that he might have rolled to the ground with the tackling officer but was clear that once he ended up on the ground, there was no one underneath him.

[16] Mr. Nobody recalls being pinned to the ground by officers, unable to move his shoulders or legs. He was hit a number of times. He could hear officers yelling at him not to resist and ordering him to give them his arms. Mr. Nobody testified that he yelled back that he wasn't resisting. He believes he was on the ground for 30 to 60 seconds before being pulled to his feet with his arms restrained behind him. It was not until he viewed the video recordings of his arrest that he realized that a police asp had been used in his arrest.

[17] He acknowledged, in response to defence questioning, that he had told

officers from the S.I.U. that he had also been assaulted by two plain-clothes officers who had thrown him to the ground and kicked him in the face. He agreed that he cannot say which incident with the police caused the bruises on his body.

[18] The defence mounted a vigorous attack on the credibility of Adam Nobody. Specific reference was made to the June 5, 2010 posting on his face book page " G-20 oil leak, angry communers, patrol man and cop, leaders, followers, zones and numbers = KABUM TORONTO KABUM"³ as evidence that he had prior information from sources that there would be a planned explosion of violence in the downtown streets of Toronto during G20.

[19] Although denying the suggestion that he had hoped for upheaval, Mr. Nobody testified that given what he had read and heard in the news he had believed that some sort of clash was possible and that was what his posting reflected.

[20] He acknowledged that he has a civil action against the officers who arrested him that day and the Toronto Police Service and that he believes a conviction in this trial would assist in his civil action.

[21] It was clear from his evidence and from earlier statements led in cross examination that Mr. Nobody has always thought that he arrived downtown around 3:30 p.m. and was arrested some two hours later. He was confronted with the CTV live footage from 6 p.m. that day. The footage shows him standing some 20 feet away from the police line with his hands in his pockets. A line of officers in riot gear are blocking the road. People can be heard coughing and saying 'shame on you'. An object is seen flying through the air from somewhere behind Mr. Nobody and landing in front of the officers.⁴

[22] Adam Nobody readily admitted that given the video footage he was mistaken as to the time of his arrest. He explained that he was not wearing a watch that day and must have left home later than he thought. He maintained however that he still felt confident about the chronology of events and the length of time that he was downtown.

[23] He denied seeing the object thrown in the video and pointed out that the video shows him looking in the opposite direction when the object came through the air. He agreed that people in the crowd were yelling at the police and that there may well have been people close enough to touch the police shields. He denies that he saw anyone doing that forcefully.

[24] He was shown another video⁵ in which he is seen standing with his hands in his pockets facing a solid wall of officers who are some distance away. An object can be seen in the air landing on the ground, some distance from Mr. Nobody. The

³ Exhibit 41

⁴ Exhibit 27

⁵ Exhibit 38

line of officers starts walking towards the crowd, beating their shields. Mr. Nobody is not shown throwing anything at the police or approaching police lines. No evidence was led as to when or where this video was recorded however one can see the same Toronto Transit Commission sign marking the subway entrance that is also seen in the CTV footage shot at 6 p.m.

[25] Babak Andalib-Goortani (the defendant) testified that he was shaken and unsettled by the events of June 26th 2010. Although he had not witnessed it himself, he was aware that in other parts of the downtown area officers were being directed to retreat because crowds were out of control.

[26] He and other members from his police division had been assigned to assist with crowd and traffic control that day. Curiously, although working in uniform, the defendant had neither his badge number nor name tag on. He speculated that he might have left his name tag on his rain jacket but could not recall the reason for removing his badge number.

[27] Later in the day he and his fellow officers were deployed to assist the Public Order Unit as arrest teams. It was in the course of this duty that the arrest of Adam Nobody took place.

[28] The defendant testified that he heard someone say ‘there he is, get him’ and he saw an officer chasing Adam Nobody. When the rest of his team started to run, he followed them. Adam Nobody was tackled by one officer; they both fell to the ground and other officers surrounded them.

[29] The defendant testified that he used his police asp on two occasions during the arrest of Adam Nobody. He explained that he hit Mr. Nobody on the thigh because he felt that Constable Donaldson was having difficulty holding on to his leg.

[30] Seconds later when Adam Nobody’s hands had not yet been flex-cuffed, he decided to “escalate” the force being used in the arrest and shoved his police asp once and then two more times at Adam Nobody’s thigh. He explained that he had been trained to use force on another area of the body to secure compliance when a subject was not following police commands.

[31] The defendant viewed all of the arrest videos at full speed and then again in slow motion or frame by frame. During this procedure he identified those movements of Adam Nobody which led him to believe that an escalation of force was necessary.

[32] In the course of that exercise, the defendant confirmed that the video footage shows that once Adam Nobody is taken to the ground he is surrounded by a number of officers. As many as three different officers are seen punching, kicking and kneeling Mr. Nobody multiple times in the face and body during the arrest.

[33] The defendant also confirmed that the video footage shows one officer applying a knee strike to Adam Nobody’s facial area just before the defendant pulls

his arm back and strikes Adam Nobody three times with his asp.

[34] Although the defendant acknowledged that he was aware at the time of the arrest that some of his fellow officers were punching Mr. Nobody, he testified he was not aware of the extent of the blows being struck nor did he see the knee strikes or kicks recorded on the videos.

[35] Dr. Christopher Milroy was qualified as an expert in the patterning of bruises. He viewed a photograph taken of Adam Nobody.⁶ It was Dr. Milroy's opinion that the bruises depicted in that photograph were more likely to have been caused by hard punches, knee strikes or kicks rather than the butt end of a police asp. He testified he would have expected a police asp to have caused a smaller, doughnut shaped bruise.

[36] His opinion was tempered with three provisos. Never having viewed injuries caused by impact with the butt end of a police asp he can only hypothesize as to how they would present. He agreed that it would have been preferable to have actually viewed the bruises rather than relying on a photograph especially this photograph which was not particularly distinct. Finally as there is no scale in the photograph he was only able to estimate the size of the bruises.

[37] He suspected, having viewed the video footage, that the asp may have come into contact with Mr. Nobody's thigh or back rather than the area depicted in the photograph.

[38] It may be that the bruises on the side of Mr. Nobody's body depicted in the photograph occurred as a result of punches and kicks. The reality is, however, that the defendant has testified that he intended to hit Adam Nobody in the thigh with his police asp and that he believes that he did so. It is that action which is the subject of this criminal charge, assault with a weapon.

[39] Staff Sgt. John Stockfish is responsible for the 'use of force' training provided to the Toronto Police Service. The defence sought to have him testify not only with respect to the use of force model taught to officers but also to offer an opinion after reviewing the videos as to whether or not Mr. Nobody actively resisted the officers and whether the actions of the defendant were in accordance with his training. I ruled that the informational component of his evidence was admissible but not the opinions sought by the defence.

[40] Staff Sgt. Stockfish testified that batons are considered an intermediate force option and that officers are taught that their use is justified when necessary to control a potentially violent situation where other force options are not viable. Officers are trained that when faced with a potentially violent situation they need to control the situation as quickly as possible using the least amount of force necessary and that the force is to be responsive to the behaviour. He confirmed that

⁶ Exhibit 9a

pain compliance is a recognized technique taught to the officers. The purpose is to interrupt the thought process driving the person's resistance or assaultive actions. Multiple strikes may be appropriate depending on the circumstances.

[41] The defence submits that Adam Nobody was a much more active member of the demonstrators than he acknowledged in his testimony. It is submitted that much as he downplayed his involvement in the demonstration, he downplayed his resistance in the arrest.

[42] Sgt. Alderdice, Inspectors O'Connor and Cashman as well as Constables Hockaday and Santarelli testified for the defence. They were part of the police line tasked with moving the crowd north towards the Legislative Building and all testified that they were aware of Adam Nobody prior to his arrest. They described him as being an active member of the protesters. None of the officers could give any times with respect to when they had made these observations. Nor were they able to say when they formed the police line at College Street and University Avenue except that by the time they arrived, the damage to the van depicted in Exhibit 21 had already occurred.

[43] Cst. Hockaday, who was assigned to Inspector O'Connor's unit, recalls a male who he now identifies as Adam Nobody approaching the police line and walking back and forth. Mr. Nobody was at least ten feet away from the line of officers. Mr. Nobody was told several times to move back. Attempts were made to arrest him but he would disappear into the crowd only to return and continue challenging the officers. At the time the officer had noted his observations of this individual in his police service notebook.

[44] Hockaday believed that Adam Nobody had been targeted for arrest because of his taunting of the officers and his refusal to leave when directed to do so.

[45] Cst. Santarelli also had made notes about a male, whom he believes to be Adam Nobody, telling others not to run or be afraid of the police. He was challenging the officers telling them to 'fuck off' and that he was "going to kick their heads in". He too recalled that attempts were made to arrest him.

[46] Only one officer testified that Adam Nobody was doing anything more than verbally challenging the police. Inspector Cashman testified that Adam Nobody, together with other protesters, was actually right up at the police line hitting the police shields.

[47] Only Inspector Cashman recalls Adam Nobody banging on police shields. All of the other officers including the two officers who actually made notes of his behaviour, Constables Hockaday and Santarelli, were clear that his actions towards the police were only verbal and that he had no direct contact with the police line. I am not prepared to rely on Inspector Cashman's evidence on this point given the

above inconsistencies.

[48] I find it somewhat surprising that Alderdice, O'Connor and Cashman three years later would have such a vivid recollection of Adam Nobody's behaviour that day, given the crowds of people that they were dealing with. I am troubled by the fact that, although they all now identify Adam Nobody as a significant and memorable troublemaker, none of these senior officers recorded anything in their notes about him that day.

[49] Thirteen months had passed before Sgt. Alderdice was interviewed by the S.I.U. and provided his first statement with respect to this incident. Inspector O'Connor testified that he only made the connection between the person he observed and Adam Nobody as a result of a conversation with Inspector Cashman a year and half later. He can recall no details about this conversation or why it even triggered the connection. Although aware that the defendant had been charged with this assault and that his information might be relevant, he chose to inform no one.

[50] Given the distinctiveness of the t-shirt worn by Adam Nobody and the fact that he and all the officers reference the argument that he has described concerning the return of his water bottle it is clear that he is the man observed by Santarelli and Hockaday and described by the other officers. I am less persuaded as to the reliability of some of the observations that the officers claim to have made.

[51] Mr. Nobody testified that he was challenging the officers' authority to push people back saying things like 'Why are you charging us? Why are you attacking us? Why are you coming and attacking random people and pulling them behind police lines?' He acknowledged that there were times when the police chased him and others into the crowds. He denied that he knew he had been targeted for arrest.

[52] I accept Mr. Nobody's evidence on that point. The fact that even after he was chased into the crowds he engages in a protracted argument about the return of his water bottle is consistent with someone who is not concerned about the police arresting him.

[53] Adam Nobody was clearly verbally confrontational to the police and he acknowledged that in his evidence. It may be that the officers perceived him as more verbally aggressive than he believes he was. However the inconsistencies between his testimony and that of the officers are not such as to cause me to make the findings of credibility against him urged by the defence.

[54] I accept Mr. Nobody's explanation for his face-book entry and I draw no adverse inference from the fact that he has a civil action against the police for what happened to him that day.

[55] In any event, the reality is that this case does not stand or fall on Adam Nobody's testimony. The fact that the defendant struck Adam Nobody is conceded. The arrest and the blows and timing of the blows are captured on video.

[56] Section 25(1) of the Criminal Code of Canada provides that “Everyone who is required or authorized by law to do anything in the administration or enforcement of the law as a peace officer is, if he acts on reasonable grounds, justified in doing what he is required to do or authorized to do and in using as much force as is necessary for that purpose. “

[57] If a police officer uses more force than is necessary in the execution of his duties then that use of force amounts to an assault. If in using more force than is necessary he employs a weapon, then he has committed the offence of assault with a weapon.

[58] The Crown must prove beyond a reasonable doubt that the defendant’s use of force that day exceeded what was necessary.

[59] Babak Andalib-Goortani is presumed innocent unless or until the Crown discharges that burden. He is entitled to the benefit of reasonable doubt on the issue of credibility as with respect to any other issues which need to be decided at this trial.

[60] Even if I do not believe the defence evidence, if I am left in a state of reasonable doubt by it, the defendant is entitled to an acquittal. Even if I totally reject the defence evidence the Crown still bears the burden of proving guilt beyond a reasonable doubt on the basis of the evidence that I do accept.

[61] The defendant has testified that he believed that the force was necessary to assist the other officers who were tasked with flex-cuffing Adam Nobody.

[62] I accept that in a dynamic situation arrests need to occur quickly and that officers may well need to use force to ensure that that happens but as Staff Sgt. Stackhouse testified the force has to be responsive to the situation.

[63] Even on the defendant’s evidence the resistance offered by Nr. Nobody was minimal. The defendant’s first blow was explained because he felt Cst. Donaldson was having trouble maintaining his grip on Adam Nobody’s leg. The second three blows are said to have been necessary because he believed that other officers were having difficulty securing Adam Nobody’s arms behind his back.

[64] The defendant has testified that he did not see many of the punches and kicks administered by his fellow officers against Mr. Nobody at the time of his arrest. I do not accept nor am I left in a state of reasonable doubt that he could have observed the actions of Adam Nobody that he now relies on to justify his use of force while failing to observe his fellow officers’ blows which are so clearly visible on the video footage. I find that his explanation that he was responding to Adam Nobody’s resistance is nothing more than an after the fact attempt to justify his blows rather than the reason for them.

[65] A police officer is not entitled to use unlimited force to effect an arrest. As

Justice Lebel wrote in *R. v. Nagasuoluk*:

“While, at times, the police may have to resort to force in order to complete an arrest or prevent an offender from escaping police custody, the allowable degree of force to be used remains constrained by the principles of proportionality, necessity and reasonableness. Courts must guard against the illegitimate use of power by the police against members of our society, given its grave consequences.”⁷

[66] The objective evidence of the video footage at this trial is limited but cogent. It shows Adam Nobody on the ground surrounded by officers who are crouched over him. He is being punched, kneed and kicked. When the defendant prepares to deliver that second series of forceful baton thrusts, one officer has just applied a knee strike to Adam Nobody’s face.

[67] I do not believe, nor am I left in a state of reasonable doubt that any of the blows struck by the defendant were proportionate or necessary and I am satisfied beyond a reasonable doubt that the force used by the defendant was not necessary to control Adam Nobody or to assist in his arrest. He will be found guilty of the charge of assault with a weapon.

Released: September 12, 2013



Justice L.A. Botham

⁷ *R. v. Nagasuoluk* (2010) S.C.J. No 6, para 32 (S.C.C.)