CITATION: R. v. Andalib-Goortani, 2015 ONSC 1403
COURT FILE NO.: 13-70000145-AP
DATE: 20150304

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
HER MAJESTY THE QUEEN	)	Shawn Porter, for the Crown/Respondent
	)	
– and –	)	
	)	
BABAK ANDALIB-GOORTANI	)	Alan Gold and Melanie J. Webb,
	)	for the Accused/Appellant
	)	
	)	
	)	**HEARD:** December 8, 2014
	)	

B. P. O'MARRA, J

REASONS FOR JUDGMENT

SUMMARY CONVICTION APPEAL

[1] On September 12, 2013 the appellant was convicted of assault with a weapon by Justice L. Botham of the Ontario Court of Justice. On December 9, 2013 he was sentenced to 45 days in jail and ordered to provide a DNA sample. He appeals against his conviction and sentence.

[2] The appellant was working as a member of the Toronto Police Service in uniform on Saturday, June 26, 2010. That was the weekend of the G20 conference. There were confrontations between the police security forces and citizens. Many of the incidents were captured on video by the media and private citizens.

[3] The charge of assault with a weapon was based on blows struck by the appellant with his baton against Mr. Adam Nobody. The last three blows occurred when Mr. Nobody was on the ground and being punched and kneed by other officers.

[4] Mr. Nobody sustained injuries in this incident. The Crown has never alleged that the appellant caused any of those injuries. Proof of injury is not an essential element of the offence of assault with a weapon.

[5] Crown and defence counsel agreed at trial that the arrest of Mr. Nobody was based on reasonable grounds and was lawful.

[6] The trial judge found that the blows struck by the appellant were not proportionate or necessary, and that they were excessive in the circumstances. On that basis the appellant was convicted.

CONVICTION APPEAL

[7] The appellant submits there were the following alleged errors that necessitate a new trial:

1. The failure to consider the *mens rea* aspect of the charge.

2. The application of too strict a standard and the failure to consider relevant factors in finding that the use of force was unnecessary.

3. The exclusion the opinion evidence of Sergeant Stockfish tendered by the defence.

TESTIMONY OF ADAM NOBODY

[8] Mr. Nobody admitted that he was verbally confrontational with the police. He joined the crowd and challenged the officers. He asked them why they were charging and attacking the crowd. He verbally engaged with some officers and refused to leave the area when they did not allow him to retrieve a water bottle that had been knocked from his hand earlier.

[9] At the time of his arrest, Mr. Nobody was making a sign near Queen's Park. He testified that he saw officers walking towards him. He picked up his backpack and started to walk away. He began to run when he saw an officer running towards him. He heard someone say "get him". He was grabbed from behind and taken to the ground face down. He agreed that he may have rolled on the ground with the officer who tackled him. It was clear on the video evidence that once he was on the ground there was no one underneath Mr. Nobody.

[10] Mr. Nobody stated that he was pinned to the ground and unable to move his shoulders or legs. He was hit a number of times. He could hear officers yelling at him and ordering him not to resist. He said that he yelled back that he was not resisting. He did not realize that a baton had been used until he saw the video recording of his arrest.

[11] The trial judge found that Mr. Nobody was verbally confrontational to the police, perhaps more so than he believed. She accepted his evidence that he was not aware that the police had targeted him for arrest. In her view, the protracted argument that he had with the officers about the return of the water bottle after being chased into the crowds was consistent with the behaviour of someone who was not concerned about getting arrested.

TESTIMONY OF THE OFFICERS OTHER THAN THE APPELLANT

[12] The following officers testified as to their dealings with Mr. Nobody: Sergeant Alderdice, Constable Hockaday, Constable Santarelli and Inspector Cashman. They all testified that they

remembered the complainant and that he had been verbally confrontational with them. They also recalled that he was targeted for arrest.

[13] Given the disctinctiveness of the T-shirt worn by Mr. Nobody on June 26, 2010 the trial judge accepted that he was the man observed by the officers. She was less persuaded as to the reliability of some of their observations, including claims that the complainant physically hit the police shields and threatened the police with "kicking their heads in". The trial judge found it surprising that the officers would have a vivid recollection of the complainant as a troublemaker and yet none of them recorded anything in their notes about it.

TESTIMONY OF THE APPELLANT

[14] The appellant viewed the video footage frame by frame and testified about his state of mind at various points. He testified that his use of force was necessary to assist his fellow officers in arresting the complainant. He indicated that he assessed the situation on at least eight occasions. In cross-examination he stated that he saw an officer kick the complainant's lower left limbs but denied seeing any blows at the time of his striking Mr. Nobody. He testified that he needed to do something to help the other officers gain control of the complainant's arms.

[15] The appellant recalled that immediately before Mr. Nobody was taken to the ground, he heard an officer say, "there he is, get him". Officers from the arrest team ran forward and one officer tackled Mr. Nobody. The appellant observed Officer Low on the ground with his legs in the air and Mr. Nobody over him. When the appellant reached the scene he saw the complainant come straight up. He believed that Mr. Nobody was getting up to run away and avoid arrest.

[16] Five officers not including the appellant attempted to bring Mr. Nobody to the ground. One officer was grabbing Mr. Nobody's foot but could not gain control. The appellant observed the complainant struggle against the officers. Based on his observations of the officers' efforts to bring Mr. Nobody to the ground and Mr. Nobody's struggle and attempts to get up, the appellant concluded that Mr. Nobody was resisting the officers and the arrest.

[17] The appellant decided to use his baton to apply a distractionary strike to the complainant's leg in order to assist the officers in gaining control. He aimed at the left thigh area and applied one strike with the side of his baton from a standing position. He acknowledged that his strike might have landed above the thigh but below the hip. He said that Mr. Nobody continued to resist, kicking with one foot and flailing with the other. It also appeared to the appellant that Mr. Nobody was still trying to raise his body.

[18] The appellant proceeded to position himself around the area of the complainant's head. There were gaps in the police line that exposed the arresting officers to danger from the crowd. The appellant wanted to block any potential attacks on the officers and to assess what was happening on the ground. The officers were still struggling with the complainant, demanding that he stop resisting and give them his hands. They were struggling to get the complainant's arms from underneath him. The appellant also observed one officer apply punches to Mr. Nobody's right side.

[19] The appellant repositioned himself near the complainant's right thigh or hip area where an officer had administered the punches. When one officer was able to bring Mr. Nobody's arm up, Mr. Nobody quickly turned his shoulder down and brought his arm underneath his body. The appellant observed that the complainant was still resisting and heard officers yell "stop resisting". The officers' use of force did not allow them to gain control of Mr. Nobody so the appellant decided to apply what he called a measured use of force.

[20] The appellant was on his knees with a clear view of the thigh area and applied one thrust with the tip of his baton. He noticed that the officers were still struggling and yelling "stop resisting". He then applied two additional thrusts in quick succession to the same area. He testified that he knew that he had hit the target because he was on his knees and he had a clear view. The target was much closer and Mr. Nobody's legs were on the ground.

[21] Following the second set of strikes the appellant noticed that the officers gained control of the complainant's arms. They were no longer yelling "stop resisting" and one officer prepared his flexi-cuffs to restrain Mr. Nobody.

[22] In cross-examination the appellant acknowledged that less than a second had passed between the first thrust and the two successive thrusts that followed. Even though he did not have much time to think, the appellant said that he was able to hear the officers yelling "stop resisting" and noticed the continued jostling about of the complainant.

[23] The appellant acknowledged that on the video another officer was seen applying a knee thrust to Mr. Nobody's back rib area a split second after the appellant's distractionary strike. He agreed that the video showed officers applying knee thrusts to Mr. Nobody's face area and that three officers were seen punching Mr. Nobody in his body as well as five to six times in the face area, all prior to the final three baton thrusts by the appellant. The appellant testified that at the time of the arrest he only observed an officer punching Mr. Nobody's lower body two or three times while standing over Mr. Nobody's head. He claims he did not observe from his position the other punches, knee thrusts or kicks.

[24] The appellant acknowledged that he did not have his nametag or badge number on his uniform during Mr. Nobody's takedown. He explained that he had left his nametag in his raincoat that he had been wearing while directing traffic in the rain that morning. He also indicated that throughout that day he had taken his vest on and off. In the heat of the G20 events he had forgotten or did not have the chance to put back on his epaulets with his badge number.

[25] The appellant testified that he used force in strict compliance with the training he had received at Police College. He referred to a use of force model. He explained that, according to his training, a baton is considered an intermediate weapon. It is appropriate to use such a weapon when the subject's conduct is just short of active resistance, or when it amounts to active resistance or assault.

THE EVIDENCE OF SERGEANT STOCKFISH

[26] At trial, the defence proposed to have Sergeant Stockfish testify concerning Toronto Police Service directives and training in regards to use of force. It was also proposed that he express his opinion as to whether the appellant's actions, as depicted on the video, were consistent with that training and whether the complainant appeared to be resisting arrest.

[27] The trial judge admitted the informational component of Sergeant Stockfish's testimony, specifically the training that officers typically receive and the circumstances under which it would be appropriate to use an expandable baton. She also allowed him to answer certain hypothetical questions. She did not however allow Sergeant Stockfish to express opinions concerning whether the appellant's actions, as depicted on the video, were consistent with the appellant's training or whether the complainant resisted arrest. This was based on the second stage "gatekeeper" test in *R. v. Abbey,* 2009 ONCA 624, [2009] O.J. No. 3534, at paras. 80-95.

[28] Justice Botham ruled that whether or not the appellant's use of force was reasonable and/or necessary in the circumstances of Mr. Nobody's arrest was the very issue that she had to decide. She further found that the findings of fact that underpin that determination do not require the assistance of an expert. On those issues she would not be assisted by opinion evidence of Sergeant Stockfish as to how he would characterize the complainant's actions or whether he believed that the appellant's actions as shown on the video were consistent with his training.

MENS REA ISSUE

[29] The appellant submits that the trial judge failed to consider "any mental element, essentially imposing absolute liability on the accused for his use of force" that was found to be unnecessary. He presents the novel submission that for this offence the Crown must prove that the accused knew or was reckless that the force used was not necessary. He acknowledges there is no precedent directly on point.

[30] The evidence at trial, including the testimony of the appellant, was that he deliberately struck Mr. Nobody with his baton without his consent. The issue before the trial judge was whether the appellant was justified in doing so.

[31] The police are justified in using force to enforce the law provided they act on reasonable grounds and use only as much force as necessary. They are criminally responsible for any excessive use of force according to the nature and quality of the act that constitutes the excess. See *Criminal Code* ss. 25(1) and 26; *R. v. Asante-Mensah* (2001), 157 C.C.C. (3d) 481 (Ont. C.A.), at para. 51, aff'd 2003 SCC 38, [2003] 2 S.C.R. 3, at para. 62; *R. v. Toronto Police Service* 2012 ONSC 1339 at para. 14.

[32] The Crown at trial conceded that there were reasonable and probable grounds to arrest the complainant. Accordingly, the appellant was entitled to use proportional force to affect that arrest or to assist other officers in arresting the complainant. The appellant chose to use a weapon. The critical issue was whether that particular application of force, i.e. striking the complainant with a baton four times, was reasonable and necessary in the circumstances. See *R. v. Tricker* (1995), 96 C.C.C. (3d) 198 (Ont. C.A.) at para. 22.

[33] Professor Don Stuart addressed the issue of "putative justification" in his treatise on *Canadian Criminal Law*. He described situations where the accused genuinely believed that his act was justified in law but, on the facts as he believed them to be, no such legal justification existed. He went on to make the following comment:

> Consider the case of a police officer who genuinely but totally unreasonably believes that he can do anything with legal impunity if his primary aim is to enforce the law. The law has always placed a limitation in the form of a test of reasonableness. The law must continue to distinguish this area of justifications as a particularly delicate area in which value choices have to be reflected and in which some objectivity is inevitable. Our present law of justifications does not admit of any concept of putative justification. It is often recognized that the situation must be judged on the facts perceived by the accused, usually on reasonable grounds, but this is quite different from the assertion that both the facts *and law* must be judged on the accused's perception.

Don Stuart, *Canadian Criminal Law: A Treatise,* 6th ed. (Toronto: Carswell, 1982), at pp. 492 & 493.

[34] The Supreme Court of Canada adopted the above passage from Professor Stuart in *Roberge v. R.* [1983] 1 S.C.R. 312 at 326.

[35] Any mistake of fact relevant to an application of s. 25(1) of the Criminal Code must be a reasonable mistake of fact. See *R. v. Cluett* [1985] 2 S.C.R. 216, at pp. 237 – 232; *Hudson v. Brantford Police Services* [2001] O.J. No. 3779 (C.A.) at paras. 24, 28-32.

[36] The trial judge specifically referred to the following passage from *R. v. Nasogaluak,* 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 32:

> 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.

[37] It is clear that the trial judge was aware that the Crown bore the persuasive burden to prove beyond a reasonable doubt that the appellant's actions were not justified in accordance with s. 25 of the Criminal Code. She referred to the appellant's testimony that he believed that the force he applied was necessary to assist other officers who were involved in the detention and arrest of the complainant. The trial judge indicated that if she believed the defence evidence or if it raised a reasonable doubt, then the appellant was entitled to an acquittal. It is clear that the trial judge was alive to the significance of the evidence of the appellant as to his perception as to whether the circumstances were such as to justify his use of force. She specifically indicated that

she did not believe nor was she left in a state of reasonable doubt that any of the blows struck by the appellant were proportionate or necessary and that she was satisfied beyond a reasonable doubt that the force used was not necessary to control the complainant or to assist in his arrest.

[38] The trial judge made important findings of fact. There is no suggestion of any misapprehension of evidence and they are entitled to significant appellate deference.

ONLY AS MUCH FORCE AS NECESSARY

[39] The appellant claims that the trial judge erred in applying too strict a standard in assessing whether his use of force was unnecessary. He further submits that there was a failure to consider relevant evidence on this issue. Specifically, he submits that the trial judge failed to

1. Consider what the appellant could or could not see from where he was positioned.

2. Adequately emphasize the speed with which events unfolded.

3. Analyze or consider whether or not it would have been possible for the appellant to see all the actions of his fellow officers.

4. Consider all the factors in a situation of exigency.

5. Consider that the arrest of the complainant took place in the context of a "full blow (sic) riot situation" and at the end of a prolonged day of tension and hostilities between the civilians and the police in that area.

[40] It is important to note that the trial judge specifically referred to the following matters in her judgment following a trial that lasted eight days:

1. 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 baton. The defendant testified that he believed it was necessary to engage in the arrest and use his baton.

2. It was conceded by the Crown that there were reasonable and probable grounds to arrest Adam Nobody.

3. The defence called five officers who have testified as to observations they made of Mr. Nobody prior to his arrest.

4. 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 up his arms. Mr. Nobody testified that he yelled back that he was not 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 baton had been used in his arrest.

5. 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.

6. 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 the timing of the blows are captured on video.

7. The Crown must prove beyond a reasonable doubt that the accused's use of force that day exceeded what was necessary.

8. 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.

9. The trial judge noted that even if she does not believe the defence evidence, if she is left in a state of reasonable doubt by it, the accused is entitled to an acquittal. Even if she totally rejected the defence evidence, the Crown still bears the burden of proving guilt beyond a reasonable doubt on the basis of the evidence that she does accept.

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

11. The trial judge accepted that in a dynamic situation arrests need to occur quickly and that officers may well need to use force to ensure that the arrest is accomplished quickly, but as Staff Sergeant Stackhouse testified, the force has to be responsive to the situation.

12. Even on the accused's own evidence, the resistance offered by Mr. Nobody was minimal. The accused explained that his first blow was necessary because he felt that Constable Donaldson was having trouble maintaining his grip on Adam Nobody's leg. He stated that the last three blows were necessary because he believed that other officers were having difficulty securing Adam Nobody's arms behind his back.

13. The accused 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. The trial judge did not accept, nor was she left in a state of reasonable doubt that the accused could have observed the actions of Adam Nobody relied on to justify his use of force, but failed to observe his fellow officers' blows, which are so clearly visible on the video footage. I find that the accused's 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.

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

15. The trial judge did not believe nor was she left in a state of reasonable doubt that any of the blows struck by the accused were proportionate or necessary. She was satisfied beyond a reasonable doubt that the force used by the accused was not necessary to control Adam Nobody or to assist in his arrest. She therefore found him guilty of the charge of assault with a weapon.

[41] The actions of police officers are not to be judged against the standard of perfection even in situations where they are authorized or justified in using an appropriate level of force. A Court considering such a situation must evaluate all of the circumstances in play when assessing the reasonableness of use of force by an officer. See *R. v. Nasogaluak* at para. 35.

[42] In this case, the assessment by the trial judge of whether or not the degree of force was as much or more than necessary was essentially one of fact after applying the correct legal standard. The trial judge obviously considered all of the factors, including the testimony of the accused, and her findings are entitled to significant appellate deference. See *R. v. Nasogaluak* at paras. 9 and 38; *R. v. D.T.* 2014 ONCA 44, [2014] O.J. No. 255, at paras. 64 - 65, 69-80; *R. v. Dickie,* 2014 ONSC 1576, [2014] O.J. No. 1174, at para. 20.

[43] In my view the trial judge applied the correct legal standard in assessing whether or not the actions and particularly the blows struck by the appellant were necessary in the circumstances. The findings of fact by the trial judge related to that issue were reasonable on the evidence and I see no basis to interfere.

OPINION EVIDENCE ISSUE

[44] The appellant submits that this evidence was admissible on the issue as to whether the appellant knew, or was reckless or ought to have known that his use of force was not necessary.

[45] That submission appears to be premised on acceptance of his novel argument on the *mens rea* requirement of excessive force.

[46] The appellant refers to the case of *Pompeo.* That case involved a police officer convicted of aggravated assault in the context of a shooting. The Court found that the trial judge erred in excluding the evidence of an officer who was sought to be qualified as an additional expert related to the use of lethal force in accordance with police training. However, the issue in *Pompeo* was whether the witness was qualified as an expert. The issues of necessity and reliability were not contested. See *R. v. Pompeo* 2014 BCCA 317, [2014] B.C.J. No. 2044, at para. 62

[47] If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. Inherent in the application of this criterion is the concern that experts not be permitted to usurp the function of the trier of fact. See *R. v. Mohan* [1994] 2 S.C.R. 9, at p. 23 and 24; *R. v. Sekhon,* 2014 ONCA 791, [2014] 1 S.C.R. 272, at paras. 43-45.

[48] Case specific opinions related to credibility, knowledge and intent of an accused from an otherwise qualified expert are inadmissible. See *R. v. Singh,* 2014 ONCA 791, [2014] O.J. No. 5347, at paras. 17-24, 28-42.

[49] A trial judge's decision to admit or reject expert evidence is entitled to deference on appeal. As the Supreme Court of Canada stated in *R. v. D.D.* 2000 SCC 43 at paras. 12, 13:

> The application of the four Mohan criteria is case-specific. Determinations of relevance and necessity, as well as the assessment of whether the prejudicial effect of the evidence outweighs its probative value, must be made within the factual context of the trial. As Sopinka J. said of relevance in R. v. Morin, 1988 CanLII 8 (SCC), [1988] 2 S.C.R. 345, at p. 370, the inquiry "is very much a function of the other evidence and issues in a case". Taking into account the other evidence, the issues and her knowledge of the jury, the trial judge determines what are the live issues in the trial and whether the evidence will be necessary to enable the jury to dispose of them. The point was well put in R. v. F. (D.S.) (1999), 1999 CanLII 3704 (ON CA), 43 O.R. (3d) 609 (C.A.), at p. 625:
>
> > The trial judge has the advantage of hearing the evidence in issue, observing the jury and being able to appreciate the dynamics of the particular trial.... [T]he trial judge may also be in a better position to determine what may come within the normal experience of the average juror in the community in which the case is being tried.
>
> Finally, the trial judge may be in the best position to determine whether the probative value of the evidence is outweighed by its prejudicial effect on the trial. The trial judge knows the issues, the evidence and the jury and is charged with the ultimate responsibility of running a fair trial.
>
> For these reasons appellate courts owe deference to decisions of trial judges to admit or reject expert evidence: F. (D.S.), supra; R. v. B. (C.R.), 1990 CanLII 142 (SCC), [1990] 1 S.C.R. 717. See also R. v. K. (A.) (1999), 1999 CanLII 3793 (ON CA), 45 O.R. (3d) 641 (C.A.); R. v. Villamar, [1999] O.J. No. 1923 (QL) (C.A.), and R. v. C. (G.) (1996), 1996 CanLII 6634 (NL CA), 110 C.C.C. (3d) 233 (Nfld. C.A.). This does not preclude appellate review. Where the record clearly does not support a finding of admissibility on the basis of the Mohan criteria, the Court of Appeal may rule that the evidence should not have been admitted. However, the case-specific nature of the inquiry means that an appellate court cannot lay down in advance broad rules that particular categories of expert evidence are always inadmissible. Such a categorical approach would undermine Mohan's requirement of a case-by-case analysis of the four applicable criteria.

[50] The trial judge did not err in her ruling as to the admissibility of the proffered opinion evidence.

SENTENCE APPEAL

[51] In her reasons for sentence the trial judge indicated as follows:

> Having heard the defendant testify at trial, I can say at no time did he display any remorse for his actions or any insight into them. Three years after the event he continues to justify his assault on Adam Nobody, asserting that he was resisting arrest. I have rejected his evidence on that point.

[52] The Crown properly concedes that if the trial judge penalized or treated as an aggravating factor the appellant's plea of not guilty, having a trial, and testifying in his own defence that would constitute an error in principle.

[53] A trial judge's conclusion that an accused's testimony that he did not commit an offence was a lie cannot be regarded as an aggravating circumstance on sentence. See *R. v. Bradley* 2008 ONCA 179, [2008] O.J. No. 955, at paras. 15 and 16; *R. v. Kozy* [1990] O.J. No. 1586 (C.A.) at paras. 4-6; *R. v. Bani-Naiem* 2010 ONSC 1890, [2010] O.J. No. 1234, at para. 13.

[54] It is an error in principle to treat an accused's continued protestation of innocence as an aggravating factor on sentence. An increased sentence is not justified because the accused has pleaded not guilty, put in motion a full trial, and maintained his innocence. See *R. v. K.A.* [1999] O.J. No. 2640 (C.A.) at paras. 48 and 49.

[55] A denial of guilt does not necessarily equate to a failure to understand the gravity of the conduct of which he was found guilty or the harm such conduct can cause to a victim. See *R. v. Bani-Naiem* at para. 13.

[56] Section 726 of the *Criminal Code* provides that before determining the sentence to be imposed the Court shall ask whether the offender has anything to say. The trial judge failed to do so. That failure does not on its own invalidate the sentence hearing. See *R. v. Legault*, [2005] O.J. No. 5380 (C.A.), at para. 5.

[57] The significance of the failure to ask the appellant in this case whether he wished to say anything before sentence is that the reference to a lack of remorse is based entirely on the appellant pleading not guilty and testifying in answer to the charge. That was his constitutional right. There should have been no adverse inferences against him on this basis related to sentence. This was an error in principle. It requires this Court to impose an appropriate and fit sentence.

[58] The clashes in the streets of Toronto between police and citizens during the G20 conference were the focus of national and international attention. Persons who have been convicted of crimes related to those incidents must be dealt with fairly and in accordance with the rule of law. It would be wrong to visit on any individual offender responsibility for all that may have gone wrong during that time.

[59] There is now a substantial body of case law in Ontario holding that a custodial sentence is generally required in cases of assaults by police officers on prisoners in order to give sufficient

weight to the principles of general deterrence and denunciation. All of those cases involved some aggravating features such as: ongoing assaults by a group of officers; defenceless prisoners who were handcuffed and searched; cover ups with falsified notes and false reports; and the laying of charges against the innocent victim of an assault. Jail sentences of 30 to 60 days intermittent have been held to be the "lenient" end of the range in such cases. See *R. v. Feeney* (2008), 2008 ONCA 756; 238 C.C.C. (3d) 49; *R. v. Byrne*, 2009 ONCA 134, 242 C.C.C. (3d) 201; *R. v. Hudd*, 126 O.A.C. 350 (Ont. C.A.); *R. v. Preston*, [2005] O.J. No. 6450 (O.C.J.), aff'd [2008] O.J. No. 5136 (C.A.); R. v. *Marji*, 2012 ONSC 6336.

[60] A range of sentence does not sacrifice proportionality to parity:

> It is settled law that a "range" of sentence is simply a flexible guideline for the normal case. It assists in achieving "parity" in sentencing between comparable cases. However, it does not sacrifice "proportionality". Particularly strong aggravating or mitigating circumstances will justify departures from the "range". Furthermore, rare or unusual or exceptional cases, by definition, will always require a sentence outside the normal "range". Otherwise, the sentence would not be "proportionate to the gravity of the offence and the degree of responsibility of the offender", as required by s. 718.1 of the Criminal Code. See: *R. v. Wright* (2006), 2006 CanLII 40975 (ON CA), 216 C.C.C. (3d) 54 at paras. 16-24 (Ont. C.A.); *R. v. Jacko and Manitowabi* (2010), 2010 ONCA 452 (CanLII), 256 C.C.C. (3d) 113 at paras. 82 and 89-90 (Ont. C.A.).

R. v. Thomas 2012 ONSC 6653 at para. 50

[61] Any criminal assault by a police officer against a citizen is a serious matter. The range of sentence based on precedent does not set a minimum sentence for any and all assaults by police officers. Not all assaults by police officers require incarceration to adequately reflect the need for general deterrence and denunciation. The presence of aggravating features will often take the case into the range, and even to the upper end. Such factors would include the following:

- the nature and number of blows struck
- duration of the incident
- the use of a weapon
- the injuries caused
- a prior history of misconduct involving abuse of authority or assault

[62] The Crown conceded at trial that the arrest of Mr. Nobody was lawful and based on reasonable grounds. The blows struck by the appellant with his baton occurred in a span of approximately 22 seconds.

[63] Adam Nobody sustained injuries during the events of June 26, 2010. However, it is important to bear in mind that the Crown did not allege that any of those injuries were caused by

Mr. Andalib-Goortani. The victim impact statement of Mr. Nobody filed on sentence properly redacted reference to any injuries.

[64] The aggravating factors based on the findings of the trial judge were as follows:

i) when the appellant inserted himself into the action Mr. Nobody was already on the ground surrounded by other officers punching and kicking him

ii) the force used involved a weapon and was inflicted while Mr. Nobody lay on the ground

iii) the absence of his name tag on the front of his uniform that would make it difficult for him to be identified.

[65] There were 68 letters filed on behalf of the appellant on sentence. They present an image of a police officer who served his community on and off the job for several years. They include confirmation of the following:

- in 2010 he travelled with a group from Toronto to El Salvador to provide humanitarian relief related to an earthquake several years earlier. He participated on his own time and at his own expense

- he has been actively involved in community based policing with an emphasis on dealing with youth

- in June of 2008 he rescued an elderly man who was stranded by a flood in a park. The man was unable to walk to safety since the water was almost waist high. The man stood on a garbage can until the appellant picked him up and carried him to safety.

[66] The authors of all the letters were aware of the conviction at trial. They all attested to the appellant's prior good character and expressed confidence that he would continue as a good citizen in the future.

[67] The appellant is a first offender. There is no indication the appellant has a violent disposition that would cause concern for future misconduct. There is no prior history of misconduct. The appellant has made a long-standing and positive contribution to the community on and off the job. He has sustained a significant loss of income related to his employment. His reputation in the community at large has been tarnished.

[68] In *R. v. Thomas* Justice Code dealt with an appeal from conviction and sentence. That case involved an off duty police officer who became involved in a "road rage" incident and an altercation at the roadside. Thomas was convicted of assault causing bodily harm contrary to s. 267(b) of the *Criminal Code*. The injury caused by Thomas to the civilian was a hairline fracture of the jaw. Thomas was sentenced to 90 days intermittent. On appeal the conviction was sustained. The sentence appeal was allowed and rather than jail the Court imposed a period of probation. Justice Code referred to significant mitigating circumstances, in particular the exceptional service of Officer Thomas to the community.

[69] The appellant has experienced significant personal, family and professional negative impacts resulting from the conviction. He will have to deal with them long after any court ordered sentencing sanction. In the particular circumstances of this offence and this offender the principles of general deterrence and denunciation can be adequately addressed by a period of probation.

RESULT

[70] In the result, the appeal from conviction is dismissed. The appeal from sentence is allowed. The custodial sentence imposed by the trial judge is reduced to time served. The appellant will be placed on probation for 12 months. He will observe the statutory terms of probation. He is to refrain from any direct or indirect communication with Adam Nobody or any known member of his family other than through counsel as may be required for any court or *Police Services Act* proceedings. In addition, the appellant shall perform 75 hours of community service work during his probation term at the rate of not less than 10 hours per month. Assault with a weapon is a primary designated offence and pursuant to s. 487.051 of the *Criminal Code* the appellant is ordered to provide a DNA sample.

[71] I am grateful to both counsel for their helpful submissions.

Mr. Justice B. P. O'Marra

Released: March 4, 2015

CITATION: R. v. Andalib-Goortani, 2015 ONSC 1403
COURT FILE NO.: 13-70000145-AP
DATE: 20150304

ONTARIO

SUPERIOR COURT OF JUSTICE

HER MAJESTY THE QUEEN

– and –

BABAK ANDALIB-GOORTANI

REASONS FOR JUDGMENT

Mr. Justice B. P. O'Marra

Released: March 4, 2015