

Constable Convicted of Aggravated Assault in Police Brutality Case

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Case Commented On: *R v Lindsay*, [2019 ABQB 462 \(CanLII\)](#)

In May 2019, the Honourable Mr. Justice Michael J. Lema of the Court of Queen's Bench of Alberta (ABQB) heard a trial regarding an aggravated assault case. Despite attempting to rely on s 25 (Protection of Persons Administering and Enforcing the Law) and s 34 (Defence of Person) of the *Criminal Code*, [RSC 1985 c C-46](#), Calgary Police Service (CPS) Constable Trevor Lindsay was convicted of aggravated assault in relation to Daniel Haworth, a man who was under his arrest.

Facts

On May 25, 2015 Mr. Haworth was accused of stealing coins from his ex-girlfriend. Cst Lindsay and his partner were summoned to the incident and were informed by dispatch that Mr. Haworth had the potential to be aggressive, abused substances (including heroin) and had attempted suicide the previous day. With this information in mind, Cst Lindsay and his partner arrested Mr. Haworth for theft under and various breaches of recognizance. Mr. Haworth was handcuffed and placed in the police vehicle. Cst Lindsay and Mr. Haworth were both behaving amicably until they reached the parking lot of the arrest processing center. Although the details of what happened next were disputed, a library security camera captured the assault on Mr. Haworth. While still handcuffed, Mr. Haworth was removed from the vehicle and was punched by Cst Lindsay in the head. Cst Lindsay claimed that Mr. Haworth spat blood at him, and due to him being an active drug user, Cst Lindsay was worried about himself or his partner contracting a disease, so he punched Mr. Haworth three more times to the back of the head and threw him to the ground. Mr. Haworth was severely injured and required hospitalization. Due to the blows to his head, he was unable to recall the incident and his personality was substantially altered.

Cst Lindsay was subsequently charged with aggravated assault, contrary to s 268 of the *Criminal Code*. The key provisions for assault are replicated below:

265(1) A person commits an assault when

- (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly...

268(1) Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.

Issue for the Court of Queen's Bench

Did Cst Lindsay have reasonable grounds to believe that Mr. Haworth was going to spit at him or his partner, and was the force used excessive? (at para 10)

Analysis:

The Two Means of Justification: Sections 25 and 34

Section 25(1) of the *Criminal Code* permits police officers to use force, so long as the force used is reasonable and not excessive:

25(1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law

- (a) as a private person
- (b) as a peace officer or public officer,
- (c) in aid of a peace officer or public officer, or
- (d) by virtue of his office,

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose. (emphasis added)

Justice Lema began his analysis by considering case law relevant to s 25(1).

In *R v Nasogaluak*, [2010 SCC 6](#) the Supreme Court of Canada distilled the meaning of s 25(1):

Section 25(1) essentially provides that a police officer is justified in using force to effect a lawful arrest, provided that he or she acted on reasonable and probable grounds and used only as much force as was necessary in the circumstances... Police actions should not be judged against a standard of perfection. It must be remembered that the police engage in dangerous and demanding work and often have to react quickly to emergencies. Their actions should be judged in light of these exigent circumstances. (at paras 34 and 35, cited in *Lindsay* at para 19)

In *Crampton v Walton*, [2005 ABCA 81](#), the Alberta Court of Appeal explained what “reasonable grounds” and “necessary force” mean in relation to s 25(1) via a subjective/objective test:

In evaluating the conduct of a police officer, the court is to place itself in the shoes of the officer and assess whether reasonable grounds existed for the actions taken... the court must determine whether there was an objectively reasonable basis, given the circumstances faced by the police officer, for the actions undertaken by the officer... The police are entitled to be wrong, but they must act reasonably.

...To clarify, the second branch requires the court to determine whether the police acted on reasonable grounds in carrying out the action... The third branch focuses exclusively on the amount of force used... police officers will be exempt from liability “if they use no more force than is necessary having regard for their reasonably held assessment of the circumstances and dangers in which they find themselves.” (at paras 20 and 43, cited in *Lindsay* at para 20; emphasis added)

Justice Lema noted that s 34 also entails both subjective and objective features (at para 21). It provides:

34(1) A person is not guilty of an offence if

(a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;

(b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and

(c) the act committed is reasonable in the circumstances.

The subjective and objective nature of s 34 was explained in *R v Dyck*, [2018 ABQB 106](#):

...self-defence has both subjective and objective factors, including a determination under s34(1)(a) of whether the [person] believed on reasonable grounds that force was being used against him... but an objective determination requires consideration of all the circumstances. (at para 23, cited in *Lindsay* at para 22)

In sum, both ss 25 and 34 of the *Criminal Code* provide the police with justification to use force against arrested persons, with the caveat that the police must act reasonably, and the force used must not be excessive.

Cst Lindsay’s Testimony Regarding the Assault

Cst Lindsay’s testimony and the accepted version of events by Justice Lema – based on the library security camera footage – were different. Cst Lindsay testified that he ordered Mr. Haworth to not look at him, but Mr. Haworth was noncompliant and stated that “he could look wherever he wanted,” and that he was upset about being made to stand outside the vehicle (at para 44). Cst Lindsay then testified that Mr. Haworth “spun violently toward me and my partner” and kept doing so despite Cst Lindsay demanding he stop (at paras 44 and 45). After multiple warnings, Cst Lindsay punched Mr. Haworth in the head. He testified he was fearful for his safety:

... in that moment, I was worried he was going to spit at me or that he was seeing how quickly he could turn and whether I could stop him, things like that. (at para 49)

When asked why he didn't use a spit mask on Mr. Haworth, Cst Lindsay stated he did not consider it at the time and that "typically, we'll apply spit masks only if there has been a spitting incident or a direct threat of spitting" (at para 59). Cst Lindsay testified that after the first punch, "Mr. Haworth was spitting blood at me" and "he spat towards my face" (at para 93), so he punched Mr. Haworth three more times to the back of the head and threw him to the ground to prevent further spitting (at para 8). He also testified that he did not intend to throw him down as hard as he did (at para 9).

The Accepted Version of Events

While Justice Lema did not question the credibility of Cst Lindsay (at paras 134 and 135), he did not fully accept his version of events. Justice Lema found that while the interaction between Cst Lindsay and Mr. Haworth had been initially peaceful, things had taken a turn for the worse in the parking lot of the processing center. Justice Lema held that Mr. Haworth was not behaving in a violent manner when he kept turning to look at Cst Lindsay, and Cst Lindsay never explained why Mr. Haworth was not to turn around (at para 79). Cst Lindsay was also inconsistent with his instructions to look forward and permitted Mr. Haworth to look in his direction several times prior (at para 79). Thus, Justice Lema did not believe Cst Lindsay's testimony regarding the assault:

Contrary to Cst. Lindsay's description of Mr. Haworth as an active struggler ("spinning violently", "rapid turns", "constantly changing direction"), Mr. Haworth was, by that part, effectively under Cst. Lindsay's dominion. (at para 83)

With this in mind, Justice Lema held that Cst Lindsay did not have reasonable grounds for the first punch as it was "...anchored in his assessment of an imminent spitting attack. With no objective grounds for that assessment, the first strike cannot be justified on that basis" (at para 106).

Cst Lindsay testified that because he believed Mr. Haworth had spat at him or his partner, he had the justification to punch him three more times and throw him to the ground (at para 108). However, Justice Lema did not accept that this subjective perception of being spat at was enough to warrant the assault:

As noted earlier, the test here is subjective/objective: it is not enough that Cst. Lindsay believed that Mr. Haworth spat at him. His belief must be objectively reasonable i.e. a belief that a reasonable person would have had in these circumstances. (at para 110; emphasis added)

Justice Lema found that after the first punch, Mr. Haworth had blood collecting in his mouth and had a physiological urge to spit (at para 101). He intentionally spat away from the officers, in the opposite direction, towards the rear of the vehicle (at para 101). Furthermore, he held that Mr. Haworth did not spit again (at para 98). Interestingly, Justice Lema ruled that the act of spitting blood alone was sufficient grounds for Cst Lindsay to use *some* force to prevent disease exposure (at para 123). While some force to prevent blood exposure was warranted, the question now became whether that force was excessive?

Was the Force Used Against Mr. Haworth Excessive?

As mentioned earlier, police officers can use force against individuals, so the question was whether Cst Lindsay used excessive force in relation to Mr. Haworth spitting blood. Here, Justice Lema reiterated the test laid out in *Crampton*:

...the court is to determine whether the use of force was objectively reasonable in light of the circumstances faced by the police officer. (at para 126)

By applying the test, Justice Lema reached the conclusion that Cst Lindsay's actions could not be justified for a variety of reasons, including the fact that Mr. Haworth did not spit blood at the officers, and Cst Lindsay could have easily maintained control over him (at para 127). Despite feeling "scared" Cst Lindsay did not call on his partner for help and did not administer a spit mask (at para 127). Additionally, Cst Lindsay could have continued to press the handcuffed Mr. Haworth against the vehicle to subdue him and eradicate any further risk of spitting (at para 127). Thus, Cst Lindsay had many other options available at his disposal over punching Mr. Haworth. Justice Lema then referred to *R v Davis*, [2013 ABCA 15](#) to speak to 'reasonable options':

...in assessing whether the police officer's belief that deadly force was necessary was objectively reasonable as the Code requires, it would not have been hindsight for the trial judge to consider whether other reasonable options existed... (at paras 86-89)

Applying this principle to the case at hand, Justice Lema believed that other 'reasonable options' (such as the ones mentioned) could have been exercised by Cst Lindsay against Mr. Haworth (at para 131). Such violent measures against Mr. Haworth were unwarranted and thus could not be justified.

Conclusion

Given the sum of the evidence, Justice Lema convicted Cst Lindsay of aggravated assault. He held that the initial punch could not be justified, and the subsequent punches and throwdown utilized excessive force (at para 136). Thus, Cst Lindsay could not rely on s 25 or s 34 of the *Criminal Code* to safeguard him from criminal liability.

Commentary

In my opinion, the verdict was fair. It is an undeniable fact that police officers are often in a fight-or-flight state and are sometimes forced to make hasty decisions to ensure their safety and the safety of others. Many of us do not understand what it is like to work in a profession where we are constantly in fear for our safety. However, in this case Mr. Haworth was arrested for a relatively minor crime and was not violent. He was handcuffed the entire time and never spat at any of the officers. There is no question that beating a handcuffed man so badly that he sustained severe and life altering injuries is assault. Police brutality is very much a hot topic in contemporary society, and it will be interesting to see the impact of this ruling on future police brutality case

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