

IN THE YOUTH COURT OF NOVA SCOTIA

Citation: R. v. D.T., 2012 NSPC 9

Date: February 1, 2012

Docket: 2310137-2310148

Registry: Halifax

Her Majesty the Queen

v.

D.T., S.J. and T. G.

DECISION

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

- Judge:** The Honourable Judge Timothy Gabriel
- Heard:** September 23, 2011 and January 4, 2012
- Oral Decision:** February 1, 2012
- Written Release of
Oral Decision:** February 14, 2012
- Charges:** Criminal Code sections 270(1)(a) x 2; 129(a) x 2
- Counsel:** J. Van Wart - Crown Attorney
R. Slawter - Defence Counsel for D.T.
L. Craggs, - Defence Counsel for S.J.
M. Longley - Defence Counsel T.G.

Restriction on publication: Ban on Publication under s. 110(1) of the Youth Criminal Justice Act - Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.

Gabriel, J.P.C.

Introduction:

[1] Each accused stands charged with two counts of assaulting a Peace Officer in the execution of his or her duty contrary to s. 270(1)(a), as well as two counts each of obstructing a Peace Officer, contrary to s. 129(a) of the Criminal Code.

[2] The charges relate to an incident at Citadel High School on May 3, 2011. On that date, in the early afternoon, Constable Roger Sayer, of HRPD, was in attendance at the high school in plain clothes, for the purpose of serving subpoenas on a number of school staff and students. These individuals were required to testify as Crown witnesses in a trial scheduled to be heard approximately six weeks later. The trial related to charges that had been laid after an earlier shooting incident at the school. The alleged target of the shooting was D.T., one of the co-accused in the case at bar.

[3] Sayer attempted to serve a subpoena in relation to the trial of the shooter upon D.T., whose manner of response demonstrated that he wanted nothing to do with either him or the subpoena. One thing led to another, and a melee ensued. D.T., his two friends (and co-accused) S.J., T.G-L. (and others) are alleged to have participated in an altercation which resulted in Sayer being forced back against a wall and shoved, pushed and struck.

[4] Constable Holly Thomas, who was serving as a Citadel High School liaison officer on May 3, 2011, is also alleged to have been assaulted by one or more of the three co-accused, as she attempted to aid Sayer.

Evidence

[5] The Crown called five witnesses. Although I have considered all of the evidence presented, what follows will not be an exhaustive summary.

[6] The first witness was Stephen Corkum. Mr. Corkum is the Vice Principal of Citadel High and was thus engaged on May 3, 2011. His involvement in the subject matter of these proceedings began when he had one of the accused, D. T., in his office over something that had happened earlier in the day. As a result of this co-accused's participation in the (unrelated) activity, he was asked to go home for the day. He accordingly left Mr. Corkum's office.

[7] Corkum and Principal Greer then went out of their respective offices, as classes would soon change. Their objective was to oversee the process, making sure that it happened as efficiently as possible. As they walked toward the cafeteria, they observed D.T., along with T.G. and S. J. as well as D.T.'s brother, Dco.T., standing at the entry of the cafeteria.

[8] Mr. Corkum observed Sayer (who was dressed as a civilian) with Thomas (in police uniform) behind him, approach D.T. with the envelope in his hand. Corkum heard him indicate that it was a subpoena. D.T. "kind of pushed it away with his hand" and indicated that he was not interested in receiving the subpoena. D.T. proceeded to move further into the cafeteria. Sayer followed.

[9] Mr. Corkum indicated that by this time he was approximately 15 feet away and was not able to hear exactly what words were exchanged. The discussion appeared to become heated. After about 15 seconds, T.G., S.J. and Dco.T. moved into the cafeteria in the direction of Cst. Sayer and D.T. Pushing and shoving ensued, which forced Sayer to the left up against the wall in the vicinity of the recycle bins. Nico Williams, the school security person, became involved. The other Vice Principal, Bruce MacKay, also jumped in to try to separate the participants.

[10] Principal Greer and Vice Principal Corkum were initially arrayed on either side of the scrum. The classes were about to change (the afternoon bell was about ten minutes away). Both knew that when this happened there would be many more students milling about.

[11] Corkum left for a moment to go to his office. Once he realized that Principal Greer was doing the same thing, he immediately returned to the scene. By that time, the participants were separated.

[12] At its height, the melee included the three co-accused, as well as Dco.T., Nico Williams (the security officer), Cst. Holly Thomas, and Bruce MacKay. All were involved either in the scrum itself, or in the attempts to break it up. Corkum could not observe the specific activities of any of the participants, or "who did what to whom". Eventually the students left the school by the back door and proceeded down the street.

[13] Detective Cst. Sayer was the next witness. He is employed with HRPD, currently serving in the General Investigation Section, and has been thus employed since May, 2002.

[14] On May 3, 2011, he attended Citadel High School. He was the lead investigator of an incident that had occurred at the high school several months before, one in which gunshots had been fired at individuals at the school. A trial was to take place, and he had with him several subpoenas for staff and students, ten in number. Six or seven were directed to either staff members or students at Citadel High.

[15] Prior to attempting to serve the subpoenas, Detective Cst. Sayer met with school liaison officer, Cst. Holly Thomas, in the main office. The staff subpoenas were served initially. Some students were also called down to the office and were served in that fashion without incident.

[16] Sayer was wearing jeans, a hoodie, t-shirt, his firearm, badge, magazine and handcuffs. His badge was located on the front of his belt. His handcuffs were hanging from his back and his magazine was on his left hand side. None of these items would have been apparent to a casual observer.

[17] After serving the "first group" of people with their subpoenas, Sayer decided to leave because he had determined that at least some of the remaining students in whom he was interested were not at school that day. Both D.T. and T.G. were among those upon whom subpoenas had yet to be served.

[18] Approximately five or ten minutes after leaving the school, he received a call from Cst. Thomas. She advised him that the accused D.T. was, at that moment, in the principal's office, and that if he wished to serve him he should return because she did not believe that D.T. would be remaining in the office very long.

[19] Accordingly, Sayer went to the school a second time. Cst. Thomas met him at the main doors. By this time D. T. and several other individuals were over near the lobby. Nico Williams, the school security officer, was also in the vicinity.

[20] D.T. was observed to be pacing back and forth. Sayer approached him with subpoena in hand and said "I need to speak to you for a second D." D.T. promptly swore at the officer and attempted to walk away from him. Sayer persisted. "D., there is no need to put on a big show, just because I am here to serve you...".

[21] Although dressed in civilian clothing, and although he at no time made an announcement as such, there was no doubt in Sayer's mind that D.T. recognized him as a police officer. He indicated that he had interviewed D.T. for over one and a half hours (with his step-father in attendance) just a few months prior, while investigating the previously mentioned shooting at the school. D.T. had been the victim of the intended shooting. The interview had taken place at the police station. The two had sat no more than a couple of feet apart during the interview.

[22] D.T. continued to walk away from Sayer. The latter followed after him. D.T.'s friends were to the left standing along the wall. Sayer said "D., you know, I am just trying to serve you this subpoena because, even though you are the victim, you need to attend court, if not they can issue an arrest warrant for you". As soon as he said this, someone from the group to the left, whom Detective Cst. Sayer feels was Dco.T. swore and said "you're not going to arrest my brother". D.T. suddenly turned and said "try to f-ing arrest me". And then he cantered to the side of Sayer, got within two feet of him, with his body angled toward him, his fists clenched, right fist raised somewhat, and fixed him with a "thousand yard stare." The officer, feeling that he was about to be assaulted, told D.T. that he was under arrest, and proceeded to grab him, placing one hand on D.T.'s left wrist.

[23] Upon hearing the words "D., you're under arrest", D.T. attempted to pull away. When he did, Sayer grabbed him, placing his other hand on the left wrist. At this time, the two co-accused rushed in and began pushing and pulling at the officer until they all ended up against a wall in the cafeteria. While against the wall, the officer continued to hold onto D.T. After the pushing had started, he felt a punch and realized he could not defend himself and maintain his hold on the accused at the same time, so he let go of D.T. and shoved back against the group (people other than the three accused had become involved by this time) who were in the scrum.

[24] D.T. was thereby able to pull away and, when that happened, everyone disengaged. Some further verbal exchanges ensued, one of which included D.T.

asking Sayer if he was "scared now" because he was there all by himself, and another of which involved T.G. saying to D.T. "come on, let's just get out of here."

[25] D.T. and S.J. gave Sayer a "chest bump", and the three accused then quickly left the scene, exiting the school by the Ahern Street entrance. The officer was able to call 911, and continue in pursuit until he observed a patrol car take all accused into custody.

[26] Sayer indicated that one of the punches that he received, while up against the cafeteria wall, came from D.T., as he was actually releasing that accused. He could not say who landed the other punches. Sayer also conceded that he would not expect that his identity as a police officer was known to either T.G., or S.J., and that he had not been able to observe any physical altercations involving any of the accused and Cst. Thomas.

[27] The third witness was Agnes Greer, who is currently Principal at Gorsebrook Junior High. During the months of May and June 2011, however, she served as Principal at Citadel High in an acting capacity. When the subject incident took place (she does not recall the specific day in May 2011 or the precise time of day when it occurred), she had just exited her office, since the time for classes to change was at hand.

[28] As she came out, Greer passed Det-Cst. Sayer, who was then at the main desk speaking with the secretary. He was dressed as a civilian and she did not recognize his identity, nor was she aware at the time that he was a police officer. She continued walking in the direction of the lobby, so that she would be advantageously positioned to oversee the class change.

[29] While going through the lobby toward the cafeteria, Greer observed a seated T.G. Within moments, this student began to yell "rat, rat, rat". She immediately went over to him and asked him to explain the reason for the outburst, and to whom he was speaking. T.G. responded by saying "oh, he knows who I'm speaking to". When Ms. Greer turned she was able to see that he was staring directly at Nico Williams, the school security officer.

[30] While this was happening, D.T. was coming across the lobby from the main office. Greer was unaware (at that time) that he had just been in Vice Principal Corkum's office only moments before. She heard him use the "f" word as he came across the lobby. Much like the "rat" comment, she had no context within which to place this accused's apparent displeasure.

[31] Things then began to happen very quickly. Dco.T., D.T.'s older brother, came out of the cafeteria when he heard what his brother had said. Greer observed Det-Cst. Sayer and Cst. Holly Thomas (who was behind him) both approaching the lobby simultaneously. In her view, everyone seemed to be converging there.

[32] Up to this point, Ms. Greer had been intent upon finishing her brief conversation with T.G. , and trying to encourage him to go to class, because she could see that he was upset with Nico Williams. But things got out of hand. The "converged" group of bodies from the lobby ended up in the cafeteria. Cst. Sayer was backed up against the wall. While unsure of the precise arrangement, she knows that D.T. was close to him.

[33] Cst. Thomas was in the process of attempting to get the boys to separate. Vice Principals Corkum and MacKay were also trying to get to Sayer. S. J. and T.G. and others were "sort of on the outside of this ball of people". Greer ran to the main office to get the secretary to dial 911, then returned to the scene.

[34] By this time, the class change had begun to occur. As the extra students began to mill about, Ms. Greer recalls essentially standing with her back to the scrum. Her objective was to try to prevent other students from getting involved. At some point, she became aware that Dco. and D.T. (for certain) had exited the immediate area. She observed them going up to the mezzanine level, leaving the school, and running south on Ahern Street.

[35] Other than the initial "rat" outburst from T.G., and the expletive uttered by D.T. as he crossed the lobby, Ms. Greer was unable to recollect specifically what anyone else had said during the subsequent altercation. She felt that the whole incident might have lasted five minutes, but at the time it seemed like forever. Because her attention, at the outset, had been focused on T.G. , she was not able to observe the initial attempts by Sayer to serve D.T. with the subpoena. Moreover, after the melee broke out, she was engaged both in getting to the office to ensure

that 911 was called and, after her return to the scene, in crowd control. Because of this, Ms. Greer was unable to offer many details of the actual altercation itself.

[36] Bruce MacKay testified next. Mr. MacKay is presently a Vice Principal at Citadel High, and on the date in question, May 3, 2011, he occupied that role in an acting capacity.

[37] His involvement in what occurred that day began in the main office area. Mr. MacKay was waiting there, since he had been told that there was a plain clothes police officer in the building. He had been further made aware that this officer had been engaged in serving Court papers on some students and school personnel.

[38] He also knew that the other Vice Principal, Mr. Corkum, had D.T. in his office and was speaking with him. MacKay did not know why this accused was there, or (then) that he was connected in any way with the officer's presence in the school. He saw (the individual that he later learned was the plain clothes officer) Sayer leave the building. A little after that, he observed D.T. leave Mr. Corkum's office. The school resource officer (Cst. Thomas) left her office at almost the same time.

[39] Mr. MacKay had a sense that "something was up". He observed that Sayer had returned, and that he and the resource officer (Thomas) were heading in D.T.'s direction. Words were exchanged, and then, in his words "the whole situation sort of moved around out of my view, around the corner in behind an elevator shaft ... All of a sudden I saw everyone scurrying around the corner. Holly (Thomas) ran around the corner and I followed suit".

[40] When he had gone around the corner, Mr. MacKay observed that Sayer was up against a wall in the cafeteria with a number of boys around him, and that he was trying to free himself. Cst. Thomas went to his assistance and she was pushed off.

[41] At this point, Mackay followed Thomas to try to help, and was also pushed off. From then on, everything was like a blur. He describes indiscriminate pushing and shoving and then, almost as quickly, it was over and he observed "everybody getting out of the building".

[42] When Sayer initially approached D.T., MacKay did not know that he was a police officer. He could tell, however, that it wasn't a calm situation. It appeared that this accused was "being defensive... about (Sayer) approaching him in the building". It was apparent to Mr. MacKay, from D.T.'s reaction to Sayer, that the accused did not want to have anything to do with him whatsoever. The two exchanged words, and D.T. turned to walk away.

[43] Mackay further elaborated that when Cst. Thomas became involved in the altercation, she had essentially tried to pull T.G. off of the group, but after that she disappeared from MacKay's sight and he was unable to see her until she resurfaced to the side of him in the crowd. He did not see who pushed her.

[44] Mr. MacKay himself recalls specifically touching T.G. in an attempt, as he described it, to "de-escalate the situation". He also yelled words to the effect of "come on guys". He mentioned that, to his recollection, T.G. was trying to get D.T. to go, and recalls that at one point T.G. had physically placed a "bear hug" on D.T. in order to try and get him to leave. T.G. was also telling him that he should leave. In MacKay's estimation, the accused T.G. was "very much of a help in that situation".

[45] MacKay was able to indicate that all three accused, as well as Dco.T., were among the group that had Sayer pinned against the wall. However, other than a lot of general pushing and shoving and physical force, he did not see any punches thrown.

[46] The final Crown witness was Cst. Holly Thomas. Cst. Thomas is employed with the Halifax Regional Police Department and, at the relevant time, had been thus employed for approximately seven years.

[47] On May 3, 2011 Cst. Thomas was the school liaison officer at Citadel High. She had been fulfilling that particular role for approximately eight months by that time.

[48] Det-Cst. Sayer contacted her that day and advised that he wished to serve some documents at the school. She met him around noon and was present while he

served several documents (in the office) upon staff and some students. One of the individuals upon whom he hoped to effect service was D.T.

[49] Acting on some advice that D.T. had earlier been seen on the upper level of the school, Constables Thomas and Sayer next proceeded upstairs. There, they observed D.T. standing with a group of people and watching them. When he saw the officers, D.T. and the others ran along the pedway and out the far door. She specifically recalls that D.T. was in the group, she cannot remember the identities of the others.

[50] After that, the two officers returned to the office briefly, and Sayer left the building. Several minutes later, it came to Thomas' attention that D.T. had returned to the school and was in the area of the office, so she called Sayer and advised him to that effect. She then left her office and again went to meet her colleague in the front entrance lobby area of the school.

[51] The two officers walked towards D.T. who, with some others, was seated in the lobby area "kind of just to the right of the elevator area". Thomas states that, as they approached, D.T. stood up and began saying "f-you pigs". Sayer told him that he had to attend court, and the accused retorted "f-you. I'm not taking any papers". Sayer then said words to the effect of: "There doesn't need to be a show".

[52] D.T. then took a couple of steps to the left through the group and stood to the back side of it. Sayer followed him by going through the group.

[53] Thomas indicated that she next saw D.T. lunge at Sayer, who responded with "if you do that again you're going to be arrested". She observed the accused make a second lunge, at which time her counterpart reached out to touch D.T. She's not sure what he was saying at that point because, at the same time, the rest of the group simultaneously stood and rushed at Cst. Sayer.

[54] On cross-examination, Thomas indicated that what she had referred to as a "lunge" consisted of "kind of like a gesture like he was motioning that he was going to hit him but didn't strike him". She says that D.T. made the gesture with his arms and his chest and his upper shoulders, like he was "kind of making a lunge like he was going to hit him". She did not hear him say anything at that time. Similarly, at no time did she hear Cst. Sayer identify himself as a police officer.

[55] Sayer ended up backed against the wall facing the three accused and some others. Dco.T. was also part of the group, and Thomas joined in to try to get people off of the other officer.

[56] She initially grabbed T.G. and pulled on him from behind. He turned around briefly, looked at her face and twisted out of his jacket and then, having done so, was able to get behind her . She then states that T.G., while in back of her, put his hands around her neck and began trying to pull on her. His intent appeared to be to pull her back from the group. The whole transaction lasted maybe a couple of seconds before "...someone removed T. off of me. I 'm unsure who it was."

[57] Thomas also testified that she was pushed by S.J. while attempting to aid Sayer. This was described as one push, which caused her to stumble back a couple of steps. She had a similar encounter with D.T., who also administered a push which caused her to go backward to some extent.

[58] She continues:

"During that, it continued on and I was struck several more times by the group. I was hit in the face, and the arm, and several other places, but I'm not...I can't recall exactly who hit me those other times. I know the instance where I was pushed back, where I stumbled backward, the people were actually looking at me and pushing me backward. That continued for several more seconds and we moved around the corner. And as we started to move kind of around the elevator area, D...we were face to face, he pushed me by the throat and the neck and pushed me back again. And at that point T.(G.) began trying to get the other individuals to leave by saying 'let's just leave. Forget it'. That kind of stuff. So he did attempt later on to get the individuals to leave".

[59] Thomas also described the involvement of security officer Nico Williams, and Vice Principal Mackay, as they attempted to intervene:

"...but I don' t recall what they were doing but at that time I was, you know, kind of on the outskirts and they were...refocused their attention on, you know, chest pumping Nico and dealing...this would be Dco. started chest bumping Nico and yelling at Mr. MacKay along with the other individuals yelling and kind of shouting".

[60] When the crowd disbursed, all accused ran upstairs, at which time Sayer and Thomas followed. This took them to the pedway on the second level, where they observed the boys going out the door toward Ahern Drive.

[61] At the conclusion of the Crown's case, none of the defendants elected to call evidence.

Analysis

(A) Peace officer?

[62] Section 270(1)(a) of the Criminal Code reads as follows:

"Every one commits an offence who assaults a public officer or peace officer engaged in the execution of his duty or a person acting in aid of such an officer".

[63] The relevant portions of s. 129 of the *Code* reads thus:

"Every one who 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 (d) an indictable offence and is liable to imprisonment for a term of not exceeding two years, or (e) an offence punishable on summary conviction. R.S., c. C-34, s. 118; 1972, c. 13, s. 7".

[64] In s. 2, the relevant portion of the definition of "peace officer" states:

"peace officer includes...(c) a police officer, police constable, bailiff, constable, or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process".

[65] "Public officer" is defined in the same section as including:

"(a) an officer of customs or excise, (b) an officer of the Canadian Forces, (c) an officer of the Royal Canadian Mounted Police, and (d) any officer while the officer is engaged in enforcing the laws of Canada relating to revenue, customs, excise, trade or navigation".

[66] The evidence demonstrates that both officers Sayer and Thomas were "peace officers" within the meaning of section 2, and therefore within the meaning of both ss. 270(1) and 129(a), in the circumstances of this case.

[67] Thomas was fully uniformed, and in any event would have been known to the three accused as Citadel High's police liaison officer. Sayer, although not uniformed and not having verbally identified himself as an officer, did (in the testimony of himself, Corkum and Thomas) indicate to the accused D.T. that he was there to serve him with a subpoena.

[68] Moreover, the evidence satisfies me that the other two co-accused would have been aware of the fact that Sayer's objective was to serve documents upon D. T. For example, in the evidence of Det-Cst. Sayer, whose evidence on the point I accept, both Dco.T. and the other co-accused must have heard him say to D.T.:

"D. you know, I'm just trying to serve you the subpoena because, even though you're the victim, you need to attend court. If not they can issue an arrest warrant for you".

[69] This is because Dco.T., the accused's older brother, who was in the group with the other two co-accused, responded with words to the effect of "you're not going to arrest my brother". Use of the word "arrest" in this context would strongly suggest an awareness that something to do with "police business" was in progress. Moments earlier T.G. had directed his "rat" comment (apparently) toward the school security officer. This is a time worn pejorative suggesting complicity with the police, or someone who has divulged information to a person in authority such as a police officer.

[70] In addition, Vice Principal Corkum stated that he was able to clearly see that the officer had a document in hand which he was trying to give to the accused, and this would have been visible to all accused as well (due to their proximity to what was happening).

[71] I am not satisfied that Cst. Thomas' recollection was accurate when she stated that D.T. stood upon being approached by Sayer and herself and said "f-ing pigs" (largely because the "pigs" portion of the comment was not mentioned by Sayer, who was closest). That said, all accused were aware that Sayer was present, with a uniformed police officer, approaching the accused D.T. to serve him with a

Court document. As such, they had (when all the surrounding circumstances are factored in) knowledge that he was engaged at the very least "in the service or execution of civil (if not criminal) process".

[72] The definition of "peace officer" contained in s. 2 of the Code is an inclusive one. There is no doubt that the three accused knew that Sayer was engaged in police business, even if they may possibly have not known of his specific identity (or, in D.T.'s case, may possibly not have recollected his specific identity) as a police officer. Therefore, at the relevant time, both Sayer and Thomas were "peace officers" within the meaning of ss. 129(a) and 270(1).

(B) "Engaged in the execution of his duty" ?

[73] The evidence is clear that neither Sayer nor Thomas were seeking to arrest D.T., or any of the co-accused, when they approached him on May 3, 2011. Sayer's purpose was to effect service of the subpoena. That document required D.T. to testify at the trial of individuals charged in a earlier shooting incident at the school, an incident in which D.T. was alleged to have been the target.

[74] Service of subpoenas and other documents would certainly be included among the many things that a police officer must do from time to time, particularly an officer such as Constable Sayer, who was the lead investigator of the shooting case. Obviously, he was acting within the execution of his duty when he came to the school on both occasions that day, seeking to serve the documents.

[75] It is equally clear that D.T. wanted no part of Sayer or the document. On the occasion of his first encounter with the officers on the upper mezzanine level of the high school (when he ran away), and, shortly thereafter, when Sayer had returned to the school to effect service, he demonstrated that he had no intention taking the subpoena. In Corkum's words he (D.T.) "kind of pushed it away".

[76] Although he had run the first time, Sayer said that he had expected the student to cooperate with the service, and, in the larger sense, with the prosecution of the shooter. On cross-examination, he also evinced an awareness the "rat code". As noted earlier, the essence of this code relates to the antipathy with which certain individuals are viewed by their peers in the event of perceived cooperation with the police or, in some cases, "authority" in general.

[77] Sayer knew that in the circles in which D. T. and the other accused moved, this code was operative. This was reinforced by T.G.'s "rat" outburst, in the testimony of Principal Greer, apparently directed at school security officer Nico Williams, just before things went awry.

[78] In the face of D.T.'s attitude, Sayer persisted in his efforts to serve the subpoena, and to explain to D.T. why it was in his interest to cooperate. Not only did this prompt an outcry from Dco.T., to the effect of "you're not going to arrest my brother", it also prompted, in Sayer's evidence, this accused to take a stance or posture from which the officer inferred that he was about to be assaulted.

[79] Sayer described the encounter thus:

"The males are to the left kind of standing along the wall. And I say to him 'D., you know, I'm just trying to serve you with a subpoena because, even though you're the victim, you need to attend court, if not, they can issue an arrest warrant for you'.

At this time when I...as I saw that, almost concurrently, I can – only now that I know Dco. is D.'s brother, I hear somebody behind me saying: 'you're not going to f-ing arrest my brother, right?' And almost at the same time, D. then, as he's kind of walking away from me stops me and turns towards me and says: 'try to f-ing arrest me', and is kind of cantered to the side of me, fists clenched and kind of leans towards me. At that time I believe he was about to assault me, so I reached out with my left hand and grabbed him by the left wrist and told him he was under arrest."

[80] Sayer described a motion or inclination of T.'s upper torso, "a thousand yard stare", with the accused's right fist slightly elevated (and clenched) as the basis for his belief.

[81] On the other hand, Cst. Thomas described what she referred to as two "lunges" made by D.T., and a warning given by Sayer after the first of these "lunges" (to the effect that the accused would be arrested if he tried that again). This obviously differs from her colleague's testimony, which neither mentioned two lunges, nor a warning prior to the attempted arrest. To the extent of such difference, I accept Sayer's recollection as being the most accurate.

[82] Sayer was cross examined on this point:

Q. ...why wouldn't you just step back for a second?

A. Because I placed him under arrest. Within the time frame and the distance that we had, then you have to react within a second.

Q. Okay.

A. And I reacted and told him he was under arrest, and took him into custody by grabbing his wrist.

Q. All right. So you were working on the premise that a guy who is about to punch you would suddenly stop as soon as you said, "You're under arrest".

A. Has happened before.

Q. Okay.

A. I have been assaulted before, and I've had people try to assault me before.

Q. Okay. So you've been assaulted when people are trying to - - when you're trying to arrest a person?

A. Yes. Yeah.

Q. All right. And you weren't concerned that this would happen if you grabbed his left hand while his right hand was ready to punch you?

A. I believed it could very likely happen, but I believed at that time, if it was - - when it was - - to my belief it was me and him interacting, that I could defend myself if that happened.

[83] Sayer had alternatives (other than to persist in his effort to serve D.T. that day) at his disposal. For example, he could have left the school and arranged to attend D.T.'s place of residence and serve him there, he could have enlisted the assistance of one of the adults at Mr. T.'s residence, he could have arranged to meet with D.T. on another occasion in the principal's office, or he could have sought a warrant under s. 698(2) of the *Criminal Code* for the arrest of D.T. as a person who was evading the attempted service of a subpoena.

[84] It does not mean that Sayer ceased to act in the course of his duty merely because he pursued one alternative instead of another. However, his objective changed when he attempted to arrest D.T. He was no longer attempting merely to serve a subpoena. Was he still in execution of his duty when he did so?

[85] The *Criminal Code* provides authority for an officer to arrest without warrant:

495 (1) A peace officer may arrest without warrant

(a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;

(b) a person whom he finds committing a criminal offence; or

(c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.

(2) A peace officer shall not arrest a person without warrant for

(a) an indictable offence mentioned in section 553,

(b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction, or

(c) an offence punishable on summary conviction,

in any case where

(d) he believes on reasonable grounds that the public interest, having regard to all the circumstances including the need to

(i) establish the identity of the person,

(ii) secure or preserve evidence of or relating to the offence, or

(iii) prevent the continuation or repetition of the offence or the commission of another offence,

may be satisfied without so arresting the person, and

e) he has no reasonable grounds to believe that, if he does not so arrest the person, the person will fail to attend court in order to be dealt with according to law.

(3) Notwithstanding subsection (2), a peace officer acting under subsection (1) is deemed to be acting lawfully and in the execution of his duty for the purposes of

(a) any proceedings under this or any other Act of Parliament; and

(b) any other proceedings, unless in any such proceedings it is alleged and established by the person making the allegation that the peace officer did not comply with the requirements of subsection (2). R.S., c. C-34, s. 450; R.S., c. (2nd Supp.), s. 5; R.S.C. 1985, c. 27 (1st Supp.), s. 75

[86] Authority also exists at common law to arrest for breach of the peace. In **R v. Dedman** [1985] 2 S.C.R. 2, LeDain J. stated at pages 64 and 65:

... at common law the principal duties of police officers are the preservation of the peace, the prevention of crime, and the protection of life and liberty...

The common law basis of police power has been derived from the nature and scope of police duty. Referring to the "powers associated with the duty", Ashworth J. in *R v. Waterfield*, supra at pages 661-662, laid down the test for the existence of police powers at common law, as a reflection of police duties, as follows:

In the judgment of this court it would be difficult, and in the present case it is unnecessary, to reduce within specific limits the general terms in which the duties of police constables have been expressed. In most cases it is probably more convenient to consider what the police constable was actually doing and in particular whether such conduct was prima facie an unlawful interference with a person's liberty or property. If so, it is then relevant to consider whether (a) such conduct falls within the general scope of any duty imposed by statute or recognized at common law and (b) whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty. Thus, while it is no doubt right to say in general terms that police constables have a duty to prevent

crime and a duty, when crime is committed, to bring the offender to justice, it is also clear from the decided cases that when the execution of these general duties involves interference with the person or property of a private person, the powers of constables are not unlimited. To cite only one example, in *Davis v. Lisle* [1936] 2 All E.R. 213...it was held that even if a police officer had a right to enter a garage to make inquiries, he became a trespasser after the appellant had told him to leave the premises, and that he was not, therefore, acting thenceforward in the execution of his duty, with the result that the appellant could not be convicted of assaulting or obstructing him in the execution of his duty.

[87] In order for a charge of assaulting or obstructing a peace officer in the execution of his or her duty to be made out, I must find that Sayer was acting in the execution of his duty at the relevant time. In order for him to be acting in the execution of his duty, he must have authority to arrest D.T. at the time he purported to do so. And in order to have the authority to do so under the Criminal Code, to repeat, he is required to have had both the subjective belief that D.T. was about to assault him, and an objective basis for the belief, at the time the arrest was undertaken.

[88] As with anything else, absolute certainty is unattainable. Subjective belief may be inferred, or not, on the basis of the evidence presented. Such evidence may include what the subject said, as well as how he acted at the relevant time. The Court's role is to determine whether the Crown has proven this and all other elements of the offences, beyond a reasonable doubt.

[89] When this officer testified, it was apparent that he had reflected extensively upon the events of May 3, 2011. It would be surprising had he not done so. He indicated that he genuinely believed that D.T. was about to strike him just prior to the arrest. If I were to decide this matter on a balance of probabilities, I would have little hesitation in concluding that this was so. However, the appropriate focus is upon "reasonable doubt", rather than a lesser standard. Does it exist or not?

[90] The concept of "reasonable doubt" has borne considerable judicial scrutiny over the years, as befits its close relationship to the presumption of innocence. For example, Saunders, J.A. in **R v. Miller**, 2009 NSCA 71, having considered the sufficiency of the Trial Judge's charge to a jury on the topic, approved the following statement (paragraph 82):

... A reasonable doubt is not a far fetched or frivolous doubt. It is not a doubt based on sympathy or prejudice. It is a doubt based on reason and common sense. It is a doubt that arises at the end of the case based not only on what the evidence tells you but also on what the evidence does not tell you.
(Emphasis in original)

[91] In **R v. MacDonald**, 2009 NSPC 12, Judge Tax summarized the authorities this way:

[19] Reasonable doubt has been defined by the Supreme Court of Canada in *R. v. Lifchus*, [1997] 3 S.C.R. 320 and in *R. v. Starr*, [2000] 2 S.C.R. 144. Those cases have determined that "reasonable doubt" does not involve proof to an absolute certainty, but more is required than proof that the accused is probably guilty. If I find that the accused is probably guilty, then I must acquit. As a result, the Supreme Court of Canada cases have determined that proof beyond a reasonable doubt is much closer to an absolute certainty than it is to probable guilt.

[92] In listening to his testimony, I had the distinct impression that Cst. Sayer was "put out" (perhaps understandably) by D.T.'s uncooperative stance. As he viewed it, he was merely trying to arrange to get this accused to come to Court to testify against the person who shot at him. He had ten subpoenas to serve, and it would have been much more convenient if he did not have to chase after D.T. and (presumably) T,G. in order to do so. As such, he chose to pursue D.T. when his initial attempts at service had been rebuffed, instead of one of the other alternatives (some examples of which were noted earlier) that were available to him.

[93] He did this despite an awareness of the so-called rat code, and (presumably) of the fact that D.T. had a particularly strong incentive to avoid running afoul of it in this case. He had already been shot at once, and could conceivably be in danger if he (publicly at least) were observed by the wrong people to be flouting it.

[94] There was no urgency requiring D.T. to be served that day. The trial was many weeks into the future. Sayer knew where the student lived, and he had received D.T.'s cooperation earlier when he had interviewed him at the police station in the presence of his step-father.

[95] When D.T. swore, gestured at Sayer (in front of his friends) and walked away in the lobby area, the officer knew, as he pursued, that the accused was merely "putting on a show". He said as much.

[96] A mere second or so later, as D.T. adopted the stance (which Sayer says he interpreted as a prelude to an assault) he was said to be oriented so that his body was facing Sayer at an angle, left hand in front, right hand clenched and held behind in a threatening manner. Sayer also faced the accused on an angle. He says that he felt that D.T. was going to hit him with his right fist.

[97] Under these circumstances, for Sayer to reach forward and grab the accused's left wrist is somewhat counter intuitive. To do so was, in effect, to incline in the direction from which the anticipated punch would be coming. A more natural (and instinctive) reaction would have been to take a step (or two) back to avoid the expected punch. Even allowing for the rapidity with which everything happened, for Sayer to have reacted the way he described would have been to invite serious injury.

[98] I have concluded (albeit reluctantly) that under all of the circumstances of this case, I am left in reasonable doubt as to whether the officer had a genuine belief that he was about to be assaulted or if (when purporting to arrest D.T., while annoyed at the student's attitude) he was merely responding to the "...try to f-ing arrest me" challenge that had been flung at him.

[99] I also conclude that the common law duty to arrest for an apprehended breach of the peace is inapplicable in this case. Such a breach implies *disturbance of public tranquillity, peace and order either by commission of the act itself or the effect of such an act* **R. v. S.S.**, 1999 CanLII 18981 (Nfld CA), at para 16).

[100] Sayer did not purport to arrest in order to prevent a breach of the peace per se. While an assault is no doubt a type of a breach of the peace, as indicated, I cannot conclude that the officer's subjective belief in the prospect of same has been proven to the necessary degree.

[101] Additionally, there is no evidence that Sayer acted in anticipation of some other form of a breach of the peace. He did not indicate, for example, that he considered D.T.'s arrest necessary to establish some form of crowd control. In

fact, he was aware that had he simply backed away instead of grabbing D.T. (when the latter "postured up") a breach of the peace would not have ensued at all.

[102] With respect to Thomas, she was known to be a member of HRPD. As such, she was within the term "peace officer" as used in ss. 129 and 270(1) respectively. That said, her role at the time of the alleged offences was not that of someone "acting in the execution of her duty". Rather, she was acting in aid of Sayer. The actions performed upon her by all accused must therefore be viewed through the same "lens" as the one used in relation to her colleague.

[103] Having found that I am left in reasonable doubt as to the legality of the arrest that Sayer purported to effect, it therefore follows that I cannot conclude beyond a reasonable doubt that he was in the execution of his duty at the relevant time. It further follows that D.T. and the others cannot be convicted of either assaulting or obstructing a peace officer "in the execution of his duty" pursuant to sections 270(1) and 129 respectively, or of assaulting or obstructing "a person" (Cst. Thomas) as she acted in aid of him.

[104] This does not end the inquiry, however. Conceivably, one or more of the actions of each of the three accused could still constitute "simple" assault.

(C) Assault ?

[105] D.T. was identified clearly by Sayer as having punched him while his back was against the wall, as the officer was holding onto him. Moreover, S.J. and D.T. were described by that officer as having given him "chest bump" after the crowd had broken up and begun to disburse. In addition, both T.G. and S.J. are alleged to have shoved or pulled upon Cst. Thomas, as previously described, during the melee.

[106] The object of D.T.'s efforts (at first instance) was to escape the hold that Sayer had upon his arm. I am unable to conclude (to the requisite standard) that the amount of force that D.T. used (a punch) was excessive, particularly when, up to that point, efforts to disengage himself by wriggling out of his jacket had proven

unavailing. In fact, it was the punch itself which led Sayer to release his hold upon D.T.'s left arm, which immediately caused the accused, and the group as a whole, to disengage and step back.

[107] I consider now the actions of D.T., T,G., and S.J. in relation to Cst. Thomas in the crowd. Similarly, I am unable to conclude beyond a reasonable doubt that those actions were for a purpose other than to get to and extricate D.T., or (in the case of the push administered by the latter) to break free and get himself out of the situation. I also was unable to conclude that the force used went beyond what would have been necessary for that purpose.

[108] The chest bump administered to Sayer by S.J. and D.T. after the latter had been released and the crowd had begun to disburse, is a different matter. There was no reason for this contact to occur. It was simply gratuitous. As noted in s. 265(1) of the Code,

" a person commits an assault when (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly".

[109] Both S.J. and D.T. did intentionally exert force on Sayer, at a time when it could not be said that they were merely attempting to free themselves from the altercation or, in S.J.'s case, to come to his friend's aide. The degree of force used in this contact, under these circumstances, is irrelevant.

[110] Accordingly, I find T,G. not guilty of all charges.

[111] In relation to D.T. and S.J., I find them not guilty of obstruction pursuant to s. 129(a), and not guilty of assaulting a peace officer pursuant to s. 270(1)(a). However, I do find D.T. and S.J. guilty of the included offence of assault for the reasons noted above.