IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. J.K.S., 2013 NSPC 84

Date: September 18, 2013
Docket: 2521833, 2521834, 2521835, 2521836
Registry: Halifax

Her Majesty the Queen

v.

J.K.S., a young person

DECISION

Judge:	The Honourable Judge Jamie S. Campbell
Heard:	March 19, July 3 and July 24, 2013
Decision:	September 18, 2013
Charge:	cc 270(1)(a), cc 129(a), cc 129(a), cc 145(3)
Counsel:	John Nisbet - Crown Attorney
	Christa Thompson - Defence Counsel

By the Court:

1. At just after 5 am on 28 October 2012 police responded to a report of a shooting in the area of Demetreous Lane in Dartmouth. When they arrived a young man was on the ground, having been shot three times in the back. A crowd had gathered.

2. The police officers on the scene had a lot to deal with. They had no idea who had shot the young man. That person could have been any one of the people gathered around to observe. They didn't know whether the shooting had been a random act or a focused attack by a shooter who was still in the area, still armed and still intent on shooting the victim, a police officer or anyone else. The victim was bleeding profusely and they had to administer first aid and stanch the bleeding to keep him alive until emergency medical services arrived. The officers were performing their duties and in the circumstances, duties that required an extraordinary ability to function and focus under the pressure of a dangerous and chaotic situation.

3. The last thing they needed was some attitude from a 17 year old. That was what they got. That resulted in J.S. being charged with a number of offences. He was charged with obstructing one of the officers, assaulting an officer, resisting an officer and breach of a recognizance that had been entered into about a month

before. The first in time of those charges was obstruction under s. 129(a) of the Criminal Code.

4. The young man who had been shot was J.S.' cousin. The two young men are so close that they consider themselves to be brothers. He was upset after hearing gun shots and seeing his brother on the ground apparently shot. At this point J.S. went toward his brother. He agreed that it looked bad. He saw blood. He asked someone to call for an ambulance. The police arrived. They required him to move away from the immediate area.

5. The evidence of Cst. Burt was that he had some difficulty in getting J.S. away from his brother so that the police could do their work. Cst Burt said that, "He kind of attacked me with a barrage of profanity and names". Not surprisingly, Cst. Burt had more pressing duties than to write down the exact names that he was called. He knew that it was an upsetting situation for the young man. He told J.S. that if he didn't calm down and stop shouting he'd be arrested for a breach of the peace.

6. J.S. did not characterize his behaviour in the same way. He said that he was with his brother for a brief moment then was forced to leave. He said that he was

calm about it. When asked about swearing, J.S. said that he was calm with the officer but might have been swearing to himself but not to anyone else.

7. The police officers were, once again, dealing with a potentially lethal wound. Cst Burt spoke to the victim directly and said, "In case you die, I need to know who shot you. Do you know?" As Cst Burt said, the victim either couldn't answer him or refused to do so. Cst Burt said that by this time J.S. looked to have calmed down. He knew that there must have been some kind of relationship between them. He said that he went to J.S. and said to him, "Can you come back down and help me speak to this person and get him to tell us who did this to him so we can find the person who did the shooting?" Cst Burt said that J.S. nodded his head in agreement. J.S. came with Cst Burt and knelt down to his brother. The words he spoke, to a person he considered to be his brother, were perplexing. He said, "Don't tell them anything. You don't know nothing about nothing." He was then pulled away. Those brief words are alleged to constitute the offence of obstruction.

8. J.S. didn't deny saying that. He said that an officer asked him if he wanted to help his brother. He said that he assumed that this meant providing some kind of physical help until EHS arrived. He added however, that the officer told him to get

his brother to say who had shot him. He told his brother not to say anything. He didn't disagree with the precise wording as recalled by Cst. Burt.

9. The intent of the words was to encourage the victim to not provide the police with any information at all. The issue of whether J.S. was motivated more by a concern about his brother's safety, his brother's reputation or just thwarting the police investigation doesn't really matter very much in considering the precise legal question. His response is so intriguing however that it cannot properly be omitted from the narrative. When asked why he told his brother what he did, J.S. said that he did not want to make him a "target". This apparently means that if his brother had said who had shot him, he was concerned that people might try to harm him. His brother had just been shot by someone who might well still be in the vicinity. Someone had already pretty obviously tried to kill him. In that sense he was already a target. He could become a target in another way though.

10. Those who talk to the police, even when they have been shot, can become the targets of the criminals who survive by keeping the community in a constant state of fear. The concern might well be a more general one, that once a person has given any information to the police, he has broken a crudely and cruelly enforced

street code that might bring reprisals from people who were never even involved in that shooting.

11. Mr. Nisbet for the Crown asked him if he was really concerned about his brother's reputation in the community. He said that he was just concerned about his brother, not his reputation. He was asked if he knew what a "rat" was. Of course, he said he knew that a rat was a rodent. When asked again, he allowed that he was familiar with the use of the term in the community but it was not a term he used himself. He said that he and his brother have not talked since about who might have shot him.

12. What matters at this point is whether his words to his wounded brother constitute the offence of obstruction. The offence of obstruction contains three specific elements as set out by Judge Peter Ross, in the one case referenced by counsel at trial this matter, R. v Fraser.[1] First, there must actually be an

[1] [2002]N.S.J. No.169, 204 N.S.R. (2d) 256. The matter concluded with argument on 24 July 2013. Although there were no agreements to file further arguments the Crown filed a brief with some additional case law on 5 September. Defence counsel had not been made aware of the intention to file a further brief and no arrangements were made to schedule the filing of a reply. Defence counsel did not become aware of the brief until 10 September and she was not in a position to respond because of other professional commitments. She quite properly provided a brief on 16 September, two days before this decision was to have been rendered. To further compound the problem Mr.Nisbet for the Crown filed yet another brief, on September 17, the day before the date set for decision. It is best not to speculate on why Crown counsel in this case would appear to assume that judges in general, or I particular, wait until the night before a decision is due to prepare it. The filing of the Crown brief in that situation left defence counsel in a disadvantaged position. While I recognize that her client would like to have

obstruction. Second, that obstruction must affect the police officer in the duty he or she was performing at the time. Third, the obstruction must have been willful. [2]

13. The concept of obstruction is notoriously difficult to define. That has been described as both a "strength and a weakness of the section". [3] It involves "measuring the interaction between individuals and peace officers and drawing the line between innocent and culpable conduct". [4]

14. In an article entitled "Obstructing a Peace Officer: Finding Fault in the Supreme Court of Canada"[5] Professor Larry Wilson of the University of Windsor set out a number of situations that have been held to constitute the offence of obstruction.

> *In dealing with the offence of obstruction the courts have been very careful to draw a distinction between conduct that actually obstructs*

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a decision I have offered Ms. Thompson the opportunity to make further argument at an adjourned date should she wish to do so. In any event, the material in the Crown brief was not helpful and none of the case law cited in that brief has formed part of the reasoning for this decision.

[2] See also: R. v. Gunn [1997] A.J. No. 44, 193 A.R. 222, 113 C.C.C. (3d) 174, 6 C.R. (5th) 405, 33 W.C.B. (2d) 355, Rice v. Connolly, [1966] 2 Q.B. 414, [1966] 2 All E.R. 649

[3] R. v. Gunn, supra, para 18

[4] Ibid., para. 18

[5] (2000) 27 Man. L.J. 273-296

> *and conduct…or lack thereof…that simply makes the job of the police more difficult. For example, the refusal to identify oneself or answer questions in the absence of a legal obligation to do so will not amount to obstruction. However, where there is an obligation to identify oneself the failure to respond to police requests for identification does constitute obstruction.*
>
> *Other situations held to constitute obstruction of a peace officer include: providing a false name; refusing to stop a motor vehicle when requested; leaving the scene of an investigation; refusing to leave a place when requested to do so; destroying or hiding evidence; and advising others not to cooperate with the police.*[6] (emphasis added)

15. The cases cited by Professor Wilson for that last proposition don't really provide a clear cut answer that would apply to this case.

16. R. v. L.[7] goes back to 1922 and involves constables acting under the authority of the Ontario Temperance Act. Many of the basic and often cited principles of law are found in cases that go back decades or centuries. R. v. L. isn't one of those cases. As an example, it is, with respect, both dated and a bit flawed.

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[6] Ibid. para. 7,8

[7] [1922] O.J. No. 47, 51 O.L.R. 575, 69 D.L.R. 618, 38 C.C.C. 242 (Ontario Supreme Court – High Court Division)

The defendant was charged with obstructing the constables in the execution of their duty. The constables had gone to a hotel and searched it for liquor kept contrary to the Temperance Act. They found 8 men sitting and standing around a room with two bottles of "liquor" under a small table. The case report notes that the liquor was wine and whiskey and that incidentally there were glasses present. One of the constables told his partner to take the names of the men in the room. The defendant said, "Don't give your names to these skunks…give them Smith, Jones or any old thing."

17. The police magistrate dismissed the charges. He held that nothing the defendant said actually influenced the others to act in a way that obstructed the police. Justice Riddell on appeal disagreed. The officers were acting under the authority of the Temperance Act, which provided that they could indeed demand the name of those present and it "thereupon became the legal duty of those asked to provide their names". At that point the advice of the defendant to refuse to give their names or to give false names was an obstruction.

> *I think anything is obstructing an officer in the execution of his duty, the natural effect of which would or might be to prevent him from obtaining evidence concerning an offence, real or supposed, against the law, which it is his duty to investigate, or*

> *concerning which it is his duty to seek or obtain evidence (of course, this is not a definition, as it is far from exhaustive).*[8]

18. Justice Riddell concluded that the act of telling other people to not cooperate was in itself obstruction. It was however also clear that in doing that, the defendant was counseling them to commit an offence. The refusal of the others to provide their names was an offence under the provincial statute. The defendant, having counselled them to do that was also guilty of the offence.

19. The second case in which an individual was charged with telling others not to cooperate with the police is certainly more recent. In R.v. Pati[9] two police officers went to a location to investigate a noise complaint. The defendant told them that he was in charge of the party that was going on and refused to give his name. He then instructed the other people present not to say anything and not to respond to police questions. The judge concluded,

> *Here, the accused instructed other people not to respond to police questions and that places him into an entirely different position than he would have been had he merely refused to give*

[8] Ibid. para 34

[9] [1991] A.J. No. 206, 118 A.R. 78, 12 W.C.B.(2d) 425

> *his name. In my view the accused prevented the police from performing their duties as peace officers in carrying out their investigation of the noise bylaw infraction.*

20. Like a lot of things this has to be driven by the context. The whole situation has to be considered bearing in mind the elements of the offence. The context includes what exactly was said, by whom, to who, when and in what circumstances. The case of Regina v. Westlie[10] , although dated both in time and in some of the language and attitudes, points to the importance of the consideration of context. Plain clothed officers were patrolling on foot in what was described as "skid road" in the Gastown area of Vancouver. Their task was "to detect beggars". The officers were acting in the duty to prevent and detect crime and to "bring offenders to justice". The accused began stopping people on the street, pointing to the police and saying, "undercover police", "undercover pigs" and "undercover fuzz". The British Columbia Court of Appeal found that the actions of the accused completely frustrated the actions of the police.

21. By blowing the cover of the police, Westlie obstructed them in their duties. Merely alerting a person to the presence of the police in most circumstances would

[10] [1971] B.C.J. No. 643, [1971] 2 W.W.R. 417, 2 C.C.C. (2d) 315

not be obstruction. It would be hard to imagine how flashing your high beams at an oncoming car to caution the driver to slow down because the police are nearby would result in an obstruction charge. Yet, telling someone who is under surveillance in the investigation of a crime that the police are present is probably a different matter.

22. What J.S. said was an encouragement to his brother to do something that he may well have been legally entitled to do. There is no evidence that J.S. knew who the shooter was and that he was trying to prevent that person's apprehension by the police. There is no evidence even that J.S. would understand that his brother might have known who shot him. It is important to note that the brother had already been asked by the police and had not responded to their questions about who had shot him.

23. J.S.' words to his brother however, were not uttered as a form of advice in the course of a conversation. Like the other bystanders he was required to step back to give the police room to deal with the victim of the shooting. He may not have been happy with that but he did comply. At that point the police had control over the treatment of and access to the victim. They were acting entirely properly in taking that course of action to control the scene and provide emergency medical

assistance. While doing their best to stop a young man from bleeding to death they had every present need to find out who had done it. While his words might be important in the longer term investigation there was a critical public safety need to know right then and there whether the person with a gun was a person who had targeted him or who was simply intent on shooting anyone. J.S. could easily have said no. He could have refused the police request and that refusal would not have constituted obstruction in these circumstances. Had he said no, he would have been removed from the area where his brother was being treated. His actions in following the officer and failing to refuse to intervene with his brother, led the police to believe, reasonably, that this young man was going to help. He gained access to his brother in a controlled situation by keeping his real intentions to himself while acting as though he was going to comply with the request.

24. It is not illegal to tell a person that he is under no legal obligation to talk to the police. When the accused has been granted access by the police to the person spoken to, in a highly charged and potentially dangerous situation, that can make a difference. Where the accused, here J.S., gains access by leading the police to believe that he is going to assist them, as requested, that can make a difference. When the words spoken are an active encouragement to thwart the police not

simply in an investigation but in a pressing matter of safety, that can make a difference.

25. J.S. words to his brother may well have changed nothing. His brother had been unresponsive to the police request for information and remained so. His words might have been an empty gesture. The act of obstruction does not have to frustrate the officer's actions in carrying out his or her duty. What matters is the purpose of the obstruction not the result. The fact that an officer was not prevented from executing his or her duty is not a defence. [11]

26. Having regard to all of the circumstances at the scene of the shooting, J.S. words to his brother constituted an obstruction. The police officers were acting in the execution of their duties. They were taking control of a dangerous scene and making efforts to secure the area against a potential threat from the still at large shooter.

27. J.S. actions were willful. His intent, as inferred from the circumstances and from his own testimony, was to encourage his brother not to provide information to the police. His actions were willful to the extent of being calculated. He took

[11] R. v. Tortolano, Kelly and Cadwell (1975),28 C.C.C. (2d) 562 (Ont. C.A.)

advantage of the opportunity that had been given to him to speak to his brother and used that subtle deception to thwart the efforts of the police to convince his brother to speak.

28. The Crown has proven the elements of the offence under s. 129 beyond a reasonable doubt. I find J.S. guilty of that offence.

29. The next event in time is the alleged assault on Cst. MacNeil. Cst. Burt said that as soon as J.S. spoke those words to his brother they grabbed him and pulled him away. It was reasonable to assume that the police were entirely unimpressed with J.S. at this stage. They were trying to stop his brother from bleeding to death and to secure a dangerous crime scene, while he was intent on making their job more difficult. Cst. Burt said that he grabbed him by the elbow and told him he was under arrest for obstruction. J.S. tensed up and turned around in what the constable described as an "aggressive manner". He said that at that point, with two hands, J.S. pushed Sergeant Joanne MacNeil in the chest. Cst. Burt's evidence was that this was not a punch but just a two handed push to get her away from him.

30. Sergeant MacNeil confirmed that J.S. pushed her in the chest. She said that she didn't lose her footing or fall back. Cst. MacPhail was also present dealing

with the control of the scene. He saw Cst. MacNeil there dealing with J.S.. He did not see J.S. push Sergeant MacNeil but saw the sergeant move back. There is no suggestion that it was a punch or violent push that took her off her feet. None of the officers took the opportunity to exaggerate the force of the push.

31. J.S. in his testimony said that he was grabbed "with excessive force", to use his exact phrase, and thrown to the ground. He remembered one woman officer being present but said that the person was not Sergeant MacNeil. He allowed that maybe she had been there, out of his sight, and maybe he had backed into her or been pushed into her. He denied that he had ever seen her or pushed her.

32. J.S. is also charged with resisting Cst. Burt. Cst. Burt's evidence was that immediately upon hearing what J.S. said to his brother he was told that he was under arrest for obstruction. J.S. then pushed Sergeant MacNeil and following that Cst. MacPhail, Cst. Beaton and Cst. Burt wrestled him to the ground. Cst. Burt said that the officers needed to use some force in getting J.S. hands behind his back. He had his fists clenched and was holding hands in front of him. Despite what Cst. Burt described as repeated instructions he refused to put his hands behind his back. They all ended up on the ground.

33. J.S. says that he was not advised that he was under arrest. He was simply grabbed with excessive force and thrown to the ground. He said that he was, again to use his turn of phrase, "dumbfounded by the whole situation". He said that he wasn't resisting arrest because he wasn't under arrest to begin with and further that he was simply struggling to get his face up off the pavement. He said that he wasn't told he was under arrest until he got to the paddy wagon. He said once again, that he was dragged to the paddy wagon, and treated roughly and with excessive force. He mentioned that the handcuffs were too tight and no one did anything about it.

34. According to J.S. the treatment he received at the hands of the police left him injured. He said that he had bruises on his face, his back, his ribs and his arms. While a family member took photos of his injuries he didn't go to a doctor because he believed his family had enough to deal with already with the shooting of his cousin. The photos of the injuries were lost when a child took the sim card out of the phone with which the photos had been taken.

35. On cross examination he described the injury to his temple area as being more of a cut or scrape to the skin. He was clear about there being damage to the area around his face. His evidence left the impression that he was beaten up and

left bloodied, scraped and bruised. The evidence of his family members would suggest some pretty rough treatment as well. His aunt said that the side of his face had been "bruised up" and that his face was "puffy". His grandmother said that he looked pretty roughed up. He had scratches like he'd been in a fight. She said that his faced was scratched and bruised. Another aunt said that when she saw him he had red marks on his face and marks around his cheek bones as well as some scrapes.

36. A photograph was taken of J.S. at the police station. It is poorly lit. At the same time it shows virtually no injury at all. There is a slight discolouration around the temple area but even with the poor lighting, serious injuries would have been visible. There are no scrapes. Bruises may not have appeared yet but that photograph does not show any injury of even the slightest kind.

37. The evidence of the police officers was that J.S. had been placed under arrest. They are clear that this was not done after the fact upon arrival at the police van but immediately. I accept their evidence in that regard. It is clear that Sergeant MacNeil was present. J.S. didn't even remember seeing her there at all. He was highly agitated. His brother had just been shot and he had been separated from him, brought over to him, then pulled away from him again. His ability to process

the information about what was going on around him in those circumstances would have been significantly compromised. His interest was not in following the legally significant issue of the words of arrest. The interest of the police officers involved was in securing the scene and in insuring that the process was technically handled properly. I accept the evidence of the officers that J.S. was placed under arrest immediately.

38. J.S. says that he was not resisting arrest but was merely struggling to get himself more comfortable. The police officers once again were clear. He would not put his hands behind his back. It took three of them to bring him under control. The officers did have different recollections about which arm each of them grabbed. There are some differences in the details. Importantly, they are details. Officers were dealing with a volatile and dangerous situation involving a possible murder, a gun, a crowd and a violent and unidentified person still at large, potential in the immediate area. They are then called to deal with J.S.. While they have a good recollection of the legally significant details, it should be of no surprise that there are differences in how some matters are recalled.

39. The officers did not gild the lily. There seemed to be an understanding on the part of the police officers involved of J.S.' perspective. He was a young man in

a stressful situation. It should come as no surprise that he might react emotionally. They acknowledged that at one point he had calmed down and that the push on Sergeant MacNeil was not particularly forceful. They did not characterize his resisting as punching or lashing out but gave a restrained description of his actions which amounted to struggling.

40. I accept the evidence of the officers that Sergeant MacNeil was present and that she was pushed by J.S.. I find that she was in the execution of her duties when that happened. I accept the evidence of the officers that J.S. was placed under arrest. I accept their evidence that after being placed under arrest he continued to resist their efforts.

41. I do not accept that J.S. version of events is reliable. Nor does his testimony raise a reasonable doubt. There are a number of reasons for that. Each one might be capable of an explanation that is consistent with the reliability of his evidence. Together however they suggest that J.S. recollection of the event as related in court is not reliable.

42. His evidence was given in a very deliberate way. That can be a good thing. Here, a very articulate young man was being very careful to describe his actions in

a way that portray himself as an entirely faultless victim and the police as nothing short of brutish. There appeared to be no acknowledgement that the police were just doing their jobs and only grudging acceptance of the fact that they had an obligation to deal with the situation. When asked whether the police had a duty to prevent the shooter from shooting someone else in the area his answer was, "I would imagine".

43. Mr. Nisbet asked him about his reasons for telling his brother not to tell the police anything. When he said that he didn't want to make his brother a target Mr. Nisbet suggested that obviously his brother was already a target. J.S. response to that was to say that that was simply Mr. Nisbet's "state of mind". His version of himself was as remaining calm when first asked to move away. Yet at the same time, he was on his own version, swearing to himself but not at anyone else. Once again, it is possible that a person might calmly swear to himself in an extremely stressful situation. It just seems unlikely.

44. His evidence of being immediately thrown to the ground with "excessive force" and essentially beaten up by the police does not match the evidence of the photograph of him. The police photograph does not show any injuries whatsoever

on his face. The photograph is poorly lit but it is clearly a photograph of this young man taken in the hours after the incident.

45. He said that when he was pulled away from his brother, having said what he did, that he was surprised. The police were trying to find a person with a gun and he told the young man who had been shot and likely in the best position to identify who shot him, not to tell them anything. He said that he was surprised that the police tried to get him away after hearing that. J.S. just can't be that naïve. Despite his assertion that he had been badly beaten he didn't seek any medical attention. Rather than saying the injuries were just of the kind that could be treated at home he seemed to feel he needed an answer. People don't always seek medical attention for scrapes and bruises. He said that he didn't want to put his family through more stress given that his brother had just been shot. Getting medical attention in those circumstances and being properly treated would not be a cause of stress but on the contrary might relieve some of it.

46. He was able to state categorically that he had not been placed under arrest. He was asked whether it was possible that the words had been spoken but that he had forgotten about it. He said that he had a "vivid recollection" of the words that had been spoken that evening. He said that it was not even possible that the words

were said. He allowed for no doubt whatsoever. Yet, the same person could not recall seeing Sergeant MacNeil, who was very clearly there, on the scene and directly involved with him.

47. J.S. was questioned about his relationship with his brother, who has now recovered from the wounds he sustained in the shooting. He said that he and his brother had not talked about the issue of who shot him. In the time since his brother was shot, J.S. says that he hasn't really shown much interest in who shot his brother. Once again, that beggars belief. One would have to be concerned that the person who did this might try to do it again. J.S. may well not have wanted to get into an exchange in court about potential suspects and that might be understandable. To say that it just didn't interest him very much affects a level of nonchalance that defies the reality of situation.

48. J.S. contention was that he was the aggrieved party here and the victim of police brutality. A considerable amount of evidence was lead about his injuries and the injustice that he suffered. In his view the police were at fault for asking him to speak with his brother and that set off the chain of events. He said that this whole thing need not have happened. On that last point, I have to agree with him. Had he recognized that the police officers on the scene were simply trying to save his

brother's life and needed to give their attention to a dangerous situation rather than to an obstreperous 17 year old, this situation would not have happened. Had he acknowledged that the police were not the reason why his brother was bleeding to death this situation might well not have happened. Had he even told them that he just wasn't willing to help them this would not have happened.

49. I find him guilty of the offence of assaulting Sgt. MacNeil in the exercise of her duties and resisting Cst. Burt. As a result of those findings he is guilty of the final count under s. 145(3) for failure to keep the peace. In summary then he has been found guilty on all charges.